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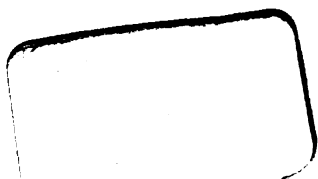
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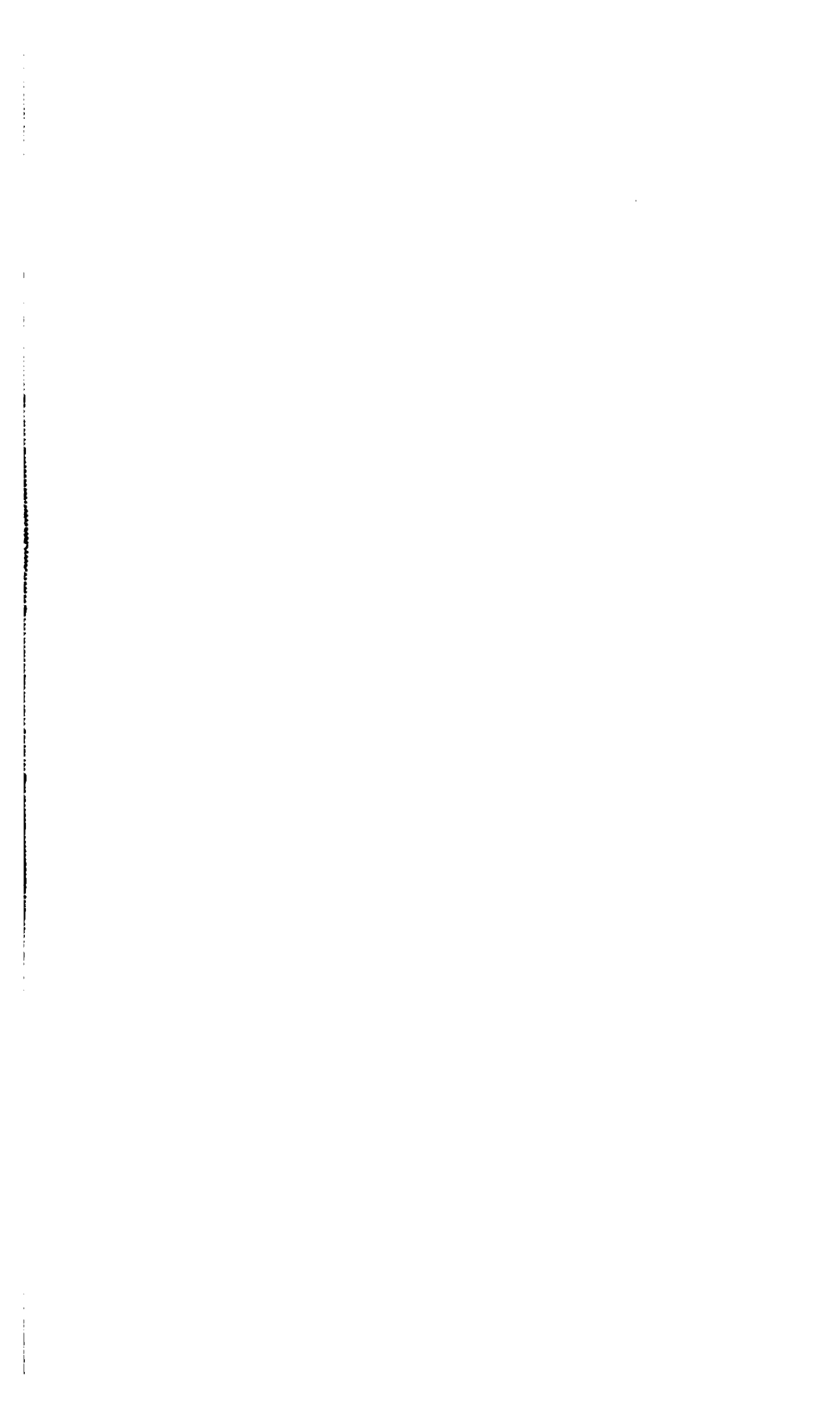
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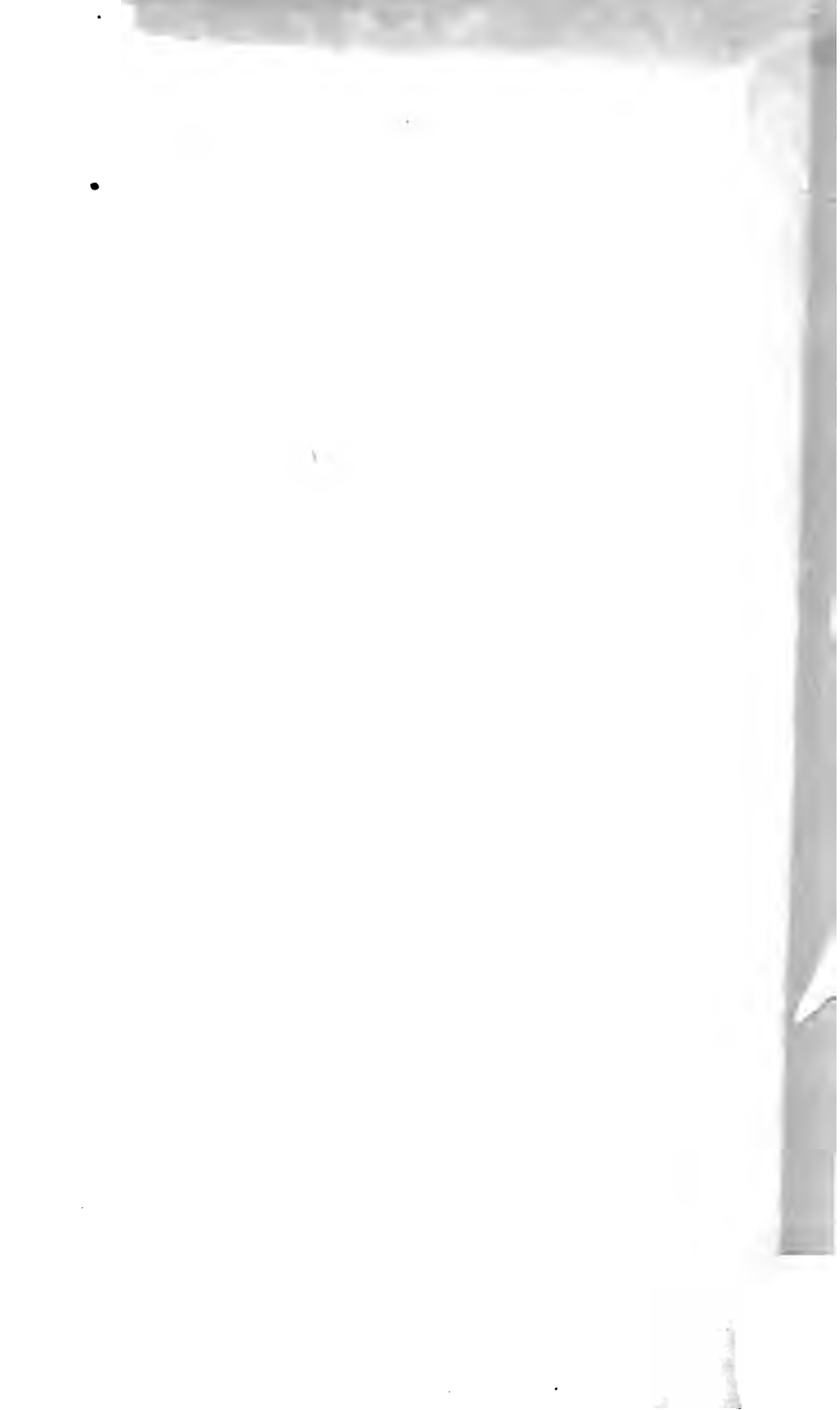














THE  
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY,

SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN  
DECISIONS" AND THE "AMERICAN REPORTS,"

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,  
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. XLVI.

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**AMERICAN STATE REPORTS.**

**VOL. XLVI**



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ALABAMA.**

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**KARR v. STATE.**

[100 ALABAMA, 4.]

**HOMICIDE—THREATS AS JUSTIFICATION.**—Evidence that deceased had made threats against the life of the accused and was of a violent and dangerous character does not justify or excuse an immediate resort to deadly weapons resulting in a killing on the mere suspicion that life is endangered. There must be some demonstration, or apparent demonstration, of an intent, coupled with ability to take life, or inflict grievous bodily harm, before extreme measures become defensive and justifiable.

**HOMICIDE—CHARACTER OF DECEASED—JUSTIFICATION.**—If the deceased was a man of violent and dangerous character, more prompt and decisive measures of defense would be justifiable than if he were of a peaceable disposition.

**HOMICIDE—CHARACTER OF AND THREATS BY DECEASED AS JUSTIFICATION.** The character of the deceased for violence and previous threats should be weighed by the jury in determining whether the defendant, when he did the killing, acted under a reasonable apprehension of present impending peril to his life, or of suffering some other grievous bodily harm.

**HOMICIDE—EVIDENCE.**—A THREATENING ANONYMOUS LETTER received by the deceased two months before he was killed is not admissible in evidence against his slayer, in the absence of evidence connecting him with the authorship or sending of the letter, or showing that it made any reference to him, or to the subject of the disagreement or other relations between him and the deceased, or that he had any knowledge that the deceased had received such letter.

**HOMICIDE—DUTY TO RETREAT.**—A PERSON ATTACKED IN HIS OWN DOMICILE is not bound to retreat to avoid killing his adversary.

*J. A. Billbro and J. W. Inzer, for the appellant.*

*W. L. Martin, attorney general, for the state.*

<sup>5</sup> STONE, C. J. The homicide which gave rise to this prosecution was perpetrated on August 28, 1892, and at the en-  
AM. ST. REP., VOL. XLVI.—2 (17)

trance of defendant's dwelling. There is no conflict in the testimony on these points. When shot down and killed deceased was approaching the door of defendant's home with a gun in hand, though not raised, or put in position for shooting. There is testimony that deceased had made threats against the life of the accused, and that he was a man of violent and dangerous character. Now, these facts alone do not, of themselves, justify or excuse an immediate \* resort to deadly weapons, on the mere suspicion that life is endangered. There must be some demonstration, or apparent demonstration, of an intent, coupled with ability, to take life, or inflict grievous bodily harm, before extreme measures become defensive, and can be resorted to: *Ex parte Brown*, 63 Ala. 187; *Brown v. State*, 74 Ala. 478; *Roberts v. State*, 68 Ala. 156; *Storey v. State*, 71 Ala. 329; *Rogers v. State*, 62 Ala. 170; *De Arman v. State*, 71 Ala. 351; *Myers v. State*, 62 Ala. 599. The several charges given at the instance of the state assert correct legal principles, and the circuit court did not err in giving them.

The tendencies of the testimony possibly called for an instruction which does not appear to have been given, or asked for. There was testimony, as we have said, tending to show that deceased was a violent and dangerous man. If such was his character and disposition more prompt and decisive measures of defense would be justifiable than if he were of a peaceable disposition. His character for violence, if found to exist, and previous threats, if believed to have been made, should be weighed by the jury in determining whether the defendant, when he fired the gun, acted under a reasonable apprehension of present, impending peril to his life, or of suffering some other grievous bodily harm: *De Arman v. State*, 71 Ala. 351; *Lang v. State*, 84 Ala. 1; 5 Am. St. Rep. 324; *Smith v. State*, 88 Ala. 73.

It was shown that deceased had received an anonymous letter about two months before the homicide occurred. It came through the mail, and was both threatening and abusive. There was no attempt to connect the defendant with the authorship of the letter, or to show that he had any agency in getting it up, or in sending it. It made no reference whatever to the defendant, or to any subject of the quarrel, disagreement, or other relations between him and the deceased. This anonymous letter was offered in evidence by the prosecution, objected to by the defendant, the objection was over-

ruled, and the letter was read to the jury. The defendant excepted. In receiving this evidence the circuit court erred.

If this testimony was offered as a reason why the deceased was bringing home a gun at the time he was fired on there are two reasons why it was improper for that purpose: 1. It was too long after the receipt of the letter to authorize the inference that the threats it contained prompted the defendant to arm himself, there being near two months between the time he received the letter and the time it appears he obtained the gun; 2. There is no attempt to show that <sup>7</sup> defendant had any knowledge or notice that deceased had received such letter. In the absence of such notice, even if such was the reason why deceased was armed, defendant's legal accountability must be tested and determined without any reference whatever to that letter. But we must not be misunderstood. What we have said in this connection is only important in making the inquiry whether defendant, at the time he fired the gun, had reasonable ground for believing, and did believe, it was necessary for him to kill Smith, in order to preserve his own life, or to save himself from grievous bodily harm. If the jury fail to find this to be the case the plea of self-defense is not made good. We will add, the defendant being in his own domicile, was not bound to retreat.

The court erred also in receiving testimony that defendant took "a drink" on the night preceding the homicide. We find no other errors.

Reversed and remanded.

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**HOMICIDE—THREATS AS JUSTIFICATION.**—To make threats of the deceased admissible in cases of homicide in connection with an overt act the proof must show such a demonstration of immediate intention to execute the threats as will naturally induce a reasonable belief that the party threatened will lose his life or suffer serious bodily injury if he does not take the life of his adversary. It must be such an act as is reasonably calculated to induce the belief that the execution of the threatened attack has actually commenced, and the circumstances of the killing must be such as tend to raise or support a case of self-defense: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note.

**HOMICIDE—EVIDENCE OF BAD CHARACTER OF DECEASED—WHEN ADMISSIBLE.**—In cases of homicide evidence of the violent and dangerous character of the deceased is admissible to show, or as tending to show, that the defendant acted in self-defense, or under such circumstances as would have naturally caused a man of ordinary reason to believe that he was at the time of the killing in imminent danger of losing his life, or of suffering great bodily harm at the hands of the deceased: *Garner v. State*, 28 Fla. 113; 29

Am. St. Rep. 232, and note; *Childers v. State*, 30 Tex. App. 160; 28 Am. St. Rep. 899, and note. Evidence of the bad character of the deceased is admissible in trials for murder only when it is shown *prima facie* that the accused had been assailed, and was honestly seeking to defend himself at the time the crime was committed: *Gardner v. State*, 90 Ga. 310; 35 Am. St. Rep. 202, and note.

**HOMICIDE—SELF-DEFENSE—DUTY TO RETREAT.**—One in his own domicile may defend himself without retreating therefrom: *Martin v. State*, 90 Ala. 602; 24 Am. St. Rep. 844, and note. A man's house is his castle, and he is not required to retreat from it when assailed: *State v. Patterson*, 45 Vt. 308; 12 Am. Rep. 200, and extended note. A man when upon his own land is not to be regarded as at bay so as to be under no duty to yield further to an assailant, unless he is in his house, or within the curtilage or space used and occupied for the purposes of the house: *Lee v. State*, 92 Ala. 15; 25 Am. St. Rep. 17.

## YELDELL v. STATE.

[103 ALABAMA, 26.]

**JUDGMENTS BY CONFESSION—COSTS.**—Upon confession of judgment for a fine and costs by a defendant and his sureties under the provisions of a statute that "when a fine is assessed the court may allow the defendant to confess judgment, with good and sufficient sureties for the fine and costs," the court may properly refuse to enter an order limiting the confession as to the costs to such as have been incurred on behalf of the state.

**TRIALS—ARGUMENT BY ATTORNEY—POWER OF COURT TO LIMIT.**—Under a constitutional guarantee "that in all criminal prosecutions the accused has the right to be heard by himself or counsel, or either, the court has power to limit the argument by counsel as to time by reasonable rules and regulations.

**TRIAL—ARGUMENT OF COUNSEL—LIMITATION OF, WHEN REASONABLE.**—If, in a criminal case, the witnesses are few, and are examined only as to the character of the accused and the party assaulted, and the principles of law are plain and familiar, a limitation of the argument of counsel for defendant to twenty-five minutes is reasonable.

*J. C. Richardson*, for the appellant.

*W. L. Martin*, attorney general, for the state.

<sup>27</sup> **HARALSON, J.** 1. The defendant was tried for an assault with intent to murder. He was convicted of an assault and battery, and fined five dollars. He asked a charge which had reference alone to an assault with intent to murder, but we will not consider it, since he was not convicted of this, but of a smaller offense, to the commission of which the charge had no reference.

2. Section 4502 of the code provides that, "when a fine is assessed, the court may allow the defendant to confess judg-



ment, with good and sufficient sureties, for the fine and costs." The defendant, after he and his sureties had confessed judgment for the fine and costs, requested the court, by an order to be entered on the docket, to limit the confession as to the costs to such as had been incurred on behalf of the state. The court refused to make such order on the docket, but stated he would instruct the clerk, and did so instruct him, to include in the taxation of the costs only such as had been incurred on behalf of the state.

To the refusal of the court to make the order on the docket as requested the defendant excepted. There was no error here. The confession of the judgment was made in exact accordance with the statute, and it was not incumbent on the court to go any further, and do as the defendant <sup>28</sup> proposed, although it would not have been improper to do so, and really, by so doing, the judgment entry in this respect would have been clearer and a mistake of a wrong taxation of the costs afterward rendered less liable to occur. The judgment entry, however, as made, could include only the costs of the state, and the clerk, without being told, was bound to know that fact, and that any taxation by him, of the costs of defendant, would be illegal: *Bowen v. State*, 98 Ala. 83.

3. The only question presented is whether the court had the right to limit the argument of the defendant's counsel as to the time it should occupy.

It is stated in the bill of exceptions that before the argument of the cause began the presiding judge stated that he would limit the arguments to fifteen minutes on each side. Against this limitation the defendant, by his attorney, protested, on the grounds that the court had no right, in a case like this, to put such a limit on the speech of his counsel; that fifteen minutes to the side was an unreasonable limitation, in violation of the defendant's rights, and he demanded that the court should not limit the argument of defendant's counsel to fifteen minutes, but allow it without limit as to time. This the court refused to do, and the defendant excepted.

After one of the defendant's attorneys had addressed the court and jury for twenty-five minutes the judge announced that his time for argument had expired, and the attorney again demanded that he be permitted to continue the argument, which the court refused to allow, and the defendant excepted.

4. The constitution of the United States provides (art. 1, sec. 7): "That in all criminal prosecutions the accused has the right to be heard by himself and counsel, or either." The constitutions of most of the states have similar provisions, and the federal constitution provides that in all criminal prosecutions the accused shall have the assistance of counsel for his defense: Amendments, art. 6.

In Georgia, in a prosecution for an assault with intent to murder, the court below, against the protest of the defendant, limited the defendant's counsel to thirty minutes in his argument to the jury. The court allowed him forty minutes. The defendant was convicted of an assault and battery. On a motion for a new trial, based on these facts, the supreme court held that the court below committed a grave error: *Hunt v. State*, 49 Ga. 255; 15 Am. Rep. 677.

In North Carolina, on a prosecution for murder, the trial <sup>20</sup> court limited the argument of counsel for defendant to one and a half hours. The right thus to limit counsel, coming before the supreme court, the court indulged in an expression of regret at the necessity of a question of the kind to be presented in that court for review, stating that, theretofore, the judges, in the exercise of their discretion in such matters, had deemed it better to submit to an abuse of the privilege of argument by counsel, rather than to appear to deny a right in such connection. The court, however, held that it was a matter within the discretion of the judges to regulate, and that an admission of the discretion was, at the same time, a denial of the right to review the exercise of that discretion: *State v. Collins*, 70 N. C. 241; 16 Am. Rep. 771.

These two cases present the extremes of the doctrine, and neither meets our approval. The correct and just principle, sanctioned by reason and authority, lies between these extremes. Courts are established for the administration and promotion of justice. If time and patience are not accorded a defendant, proceeded against in a cause in which his life or liberty is endangered, this high end and aim of the court would be subverted. If time is valuable and is pressing, if patience has been sorely taxed, any just judge will be careful, yet, to allow full and fair opportunity to counsel to present his client's defense. This much is guaranteed in the constitution, and no more; and this guaranty is not inconsistent with the existence of power in the court to regulate the exercise of the right of argument by reasonable

rules and regulations. Counsel have no more right, from whatever motive, unnecessarily to waste the time of the court, in improper and unnecessary speech, than the court has to deprive them of reasonable opportunity to make defense for their clients. Should they abuse their privilege in this regard it is the right and duty of the court to restrain them within proper and legal bounds: *Weeks on Attorneys*, sec. 115; *Proffatt on Jury Trials*, sec. 254; *State v. Page*, 21 Mo. 257; 64 Am. Dec. 229; *Lynch v. State*, 9 Ind. 541; *Muselman v. Pratt*, 44 Ind. 126; *Weaver v. State*, 24 Ohio St. 584; *Commonwealth v. Buccieri*, 153 Pa. St. 551; *Dobbins v. Oswald*, 20 Ark. 619; *Freligh v. Ames*, 31 Mo. 253.

5. The witnesses in this case were but few, and several were examined alone, as to the character of the defendant and the party assaulted, the evidence of all of them being set out in about two and a half pages of the transcript, loosely written, in a large hand. The facts were few and simple, with but slight conflict. The question of self-defense<sup>20</sup> hardly had a place for argument, and the principles of law were plain and familiar.

We fail to see any evidence in this record that the privilege of counsel was improperly restricted in this instance. In the absence of such discovery we not feel authorized to declare that the trial court exercised its discretion improperly.

Affirmed.

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**LIMITATIONS UPON ARGUMENT OF COUNSEL.**—The constitutions of the various states, almost without exception, provide that the accused shall have the right to be heard by himself and his counsel. Under such a constitution it is clear that, upon the trial of a question of fact in a criminal case, the accused has the right to be heard by counsel before the jury, and the court is without power to prevent him from being so heard, however simple, clear, unimpeachable, and conclusive the evidence may be, in the opinion of the court: *Word v. Commonwealth*, 3 Leigh, 743; *Lynch v. State*, 9 Ind. 541; *Williams v. Commonwealth*, 82 Ky. 640.

It is everywhere conceded that the trial court has discretionary power to place a limit upon the time to be consumed by counsel, both for the prosecution and for the defense, in addressing the jury. This power springs from the duty of the court to protect other litigants and the public against the unnecessary use of the time of the courts, but must be exercised so as not to abridge the undoubted right of every party before the court to fully and freely present his case to the jury. Trial courts have a superintending control over the course of argument, to prevent the abuse of that or of any other right of counsel. If such courts had no right to limit counsel as to time in the argument of a criminal case the administration of justice in many instances would be greatly hindered. It rests in the sound discre-

tion of the trial court in a criminal case to put a proper limit to the time consumed by counsel—a discretion with which the appellate court does not interfere, unless the time was made so short as to manifestly be prejudicial to the rights of the accused: *State v. Page*, 21 Mo. 257; 64 Am. Dec. 229; *State v. Shores*, 31 W. Va. 491; 13 Am. St. Rep. 875; *State v. Hall*, 31 W. Va. 505; *People v. Green*, 99 Cal. 564; *People v. Kelly*, 94 N. Y. 526; *Sullivan v. State*, 47 N. J. L. 151; *Thompson v. Commonwealth*, 88 Va. 45; *Hart v. State*, 14 Neb. 572; *Lynch v. State*, 9 Ind. 541; *Ford v. State*, 34 Ark. 650; *State v. Hoyt*, 47 Conn. 518; 36 Am. Rep. 89; *People v. Tock Chew*, 6 Cal. 637; *State v. Linney*, 52 Mo. 40; *Word v. Commonwealth*, 3 Leigh, 743; *Commonwealth v. Buccieri*, 153 Pa. St. 535.

The rule is declared in *People v. Kelly*, 94 N. Y. 526-533, to be as follows: "The time which counsel are to occupy in presenting a case to the consideration of the jury necessarily must be, to a great extent, a matter in the discretion of the court. Were it otherwise, an unlimited period might be taken without any advantage to the client, and causing great delay in the proceedings of the court and an injury to the administration of justice. The time to be used for such a purpose must, therefore, be a matter to be regulated by the presiding judge upon the trial, the same as any other proceeding during the progress of the case. It is to be presumed that the court will properly guard and protect the rights of parties so that justice can be administered to all, and the judge is certainly a competent and the proper person to determine as to the time which would be required for a proper discussion and presentation of the case on trial. Hence it follows that a court has a right to exercise a discretion in this respect, and unless such discretion is abused it is not the subject of review in a higher tribunal."

In *People v. Green*, 99 Cal. 564-567, it was said: "That a defendant being tried on a charge of felony has a constitutional right to be fully heard in his defense by counsel, which it is not within the discretionary power of the court to deny or abridge, is not to be questioned, yet it has been found impossible to formulate any abstract rule or definition by which the extent of this right may be ascertained in all cases. It is also well settled that the court has a discretionary power to restrain what has been termed, perhaps, not quite appropriately, an abuse of this right, by which is meant very little more than that counsel may be restricted to a discussion of matters relevant to the case, and restrained from wasting the time of the court by useless repetition. But it must always be a difficult, as well as a delicate, matter for the court to determine in advance what limitation should be imposed upon counsel against their consent." In *Williams v. State*, 60 Ga. 367, 27 Am. Rep. 412, the supreme court, though not denying the discretionary power of the trial court to limit counsel as to time consumed in argument, decided that the length of the argument is not a matter for pre-determination by such court. As the argument progresses its range may be confined to the facts and law of the case, and idle repetition may be interdicted; but so long as counsel speaks to the point, proceeds in good faith, and wastes no time the court should forbear to interfere, but leave the limits of the speech to the discretion of the speaker, until it is manifest that the discussion is complete or the subject exhausted. This case is opposed to the great weight of authority in denying the discretionary power of the court to reasonably limit the time to be consumed by counsel after the close of the evidence and before his argument has begun. Another case taking an extreme view of the right of the trial court to limit counsel as to the time to be consumed by him in argument is that of *People v. Kee*

men, 13 Cal. 581-584. The court said: "We do not dispute the right of the district judge to control and direct the proceedings of the court, so that the time be not wasted in arguments, disputes, and contentions having no tendency to bring about a fair and legal disposition of judicial business. An enlarged discretion must necessarily be given him over this subject, and we should certainly with great reluctance disturb the exercise of that discretion in any given case. Nor do we here question the right of a district judge to limit counsel to a reasonable time in their arguments to the jury, though, from the danger to which this power is exposed, it is, perhaps, better, if ever done at all in capital cases, that it should only be done in very extraordinary and peculiar instances. It is, unquestionably, a constitutional privilege of the accused to be fully heard by his counsel. An opportunity must be afforded him for full and complete defense, and it is very difficult for a judge to determine what effect a given line of argument may have upon a jury, or some one of them, or what period may be necessary to enable counsel to present, in the aspect deemed by them important, the case of their client. The minds of men are so differently constituted, that one advocate may require much more time for the statement and elaboration of his views than another. These observations apply with particular force to cases depending upon circumstantial testimony, where law and fact are so intimately blended that it is frequently necessary to argue the law to the jury in connection with matters of proof. It is impossible to deny that, if the constitutional privilege of being heard by counsel be allowed at all, it must be so admitted as that the prisoner may have the benefit of a complete discussion of all the matters of law and evidence embraced in the case."

The same rule maintains in civil as in criminal cases, namely, that, while the right of argument is not to be entirely denied to counsel, the regulation of the length of time to be occupied in discussing and the determination of the legitimate questions for argument must necessarily be left to the sound legal discretion and discrimination of the presiding trial judge, and the regulations and limitations imposed upon counsel as to their arguments are not subjects for review in the appellate court, except when a clear and arbitrary abuse of discretion is shown: *Monmouth etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187; *Senior v. Brogan*, 66 Miss. 178; *Musselman v. Pratt*, 44 Ind. 126; *Frelich v. Ames*, 31 Mo. 253; *Dobbins v. Oswalt*, 20 Ark. 619; *Skeen v. Mooney*, 8 Utah, 157. "Such rules as may be adopted by inferior courts must not in any wise interfere with, or abridge, the rights of parties litigant or counsel, whose right and duty it is to argue the causes confided to their care. Every party is entitled to be heard in his cause by himself or counsel. The right to a substantial hearing thus guaranteed is essential to the fair administration of law and the attainment of justice. To deprive parties of this right, or, what is equivalent to it, to give such a short time in which to perform this duty of counsel as to make it but a mockery and a sham, is tyranny and oppression, and ought not to be tolerated in a free country": *Burson v. Mahoney*, 6 Baxt. 304.

The only exception to this proposition is that, if there is no disputed material fact in the case for the jury to pass upon, the trial court may properly refuse to permit counsel to address it in argument: *Heagy v. State ex rel. Forkner*, 85 Ind. 260; *Neidig v. Cole*, 13 Neb. 39. Consideration of personal convenience on the part of the trial judge should never influence him in placing a limit in time of the argument of counsel to the jury. If the time fixed under such circumstances is insufficient to enable counsel to

present his case fully and clearly the limitation is erroneous and a cause for a reversal of the judgment rendered: *Senior v. Brogan*, 66 Miss. 178.

*Reasonable Limitations.*—As it is a universally established principle of law that the trial court may, in its discretion, limit the time to be consumed by counsel in argument, and that the only restriction upon such discretion is that the time fixed must be reasonable and sufficient to allow counsel to present his case fully and fairly to the jury, the only remaining question to be discussed is as to what is such reasonable time. On this question the views of different courts are widely at variance, so much so, indeed, that no rule can be promulgated for future guidance in any particular case. Full time should, however, be allowed for the fair discussion and full presentation of the case, and the court should always give counsel too much time, rather than too little. What might be a reasonable limitation in one case would be unquestionably unreasonable in another, and whether the discretion of the court has been properly exercised necessarily depends entirely upon the circumstances of each case, the number of witnesses examined, the volume and character of the evidence, the time consumed in the trial of the case, as well as any other matters which properly have any bearing upon the time necessary to fully present the case to the jury. Thus, in *Williams v. Commonwealth*, 82 Ky. 640, upon the trial of a charge of larceny, the lower court, against the objection and exception of counsel for the defendant, limited counsel on each side to five minutes in the argument of the case. The testimony in the case consisted of that given by three witnesses for the prosecution and one for the defense, while the facts were simple and clear. The appellate court held that such limitation of time was within the discretion of the lower court, and that, in the absence of a request for longer period made at the time, it would not interfere. The court said: "In the case now before us there was a mere exception to the order of the court; and, in our opinion it is a reasonable requirement of the defendant, and one shown by a review of the authorities to be justified by precedent, that he should ask farther time, or at least in some way inform the judge that, in his opinion, injustice will be done him by the restriction, and not content himself with a mere exception": *Williams v. Commonwealth*, 82 Ky. 644. In *People v. Kelly*, 94 N. Y. 526, a case of felonious assault, the trial court limited counsel to thirty minutes for argument. He objected, and at the end of his time, when called upon by the court to stop, complained that he had not finished, and, upon the refusal of the court to permit him to proceed with his argument, excepted. On appeal the court said: "In the case at bar the testimony lies within a narrow compass; not many witnesses were sworn, and the questions of fact presented were not numerous. The trial was commenced and the evidence on both sides submitted the same day. Upon the whole case the testimony was not very complicated, and, although a difference of opinion might exist among counsel and judges as to the period of time which would be required for the proper presentation of the case of the defendant, yet, we think it cannot be said that the judge, upon the trial of this case, in the exercise of his functions, and having in view the gravity of the charge and the rights of the defendant, exceeded his powers, or abused the discretion with which he was invested." Again in *Weaver v. State*, 24 Ohio St. 584, a case of an assault with intent to kill, the taking of the testimony occupied two days, and the trial court limited the argument of counsel to five hours on each side. Counsel for the defendant excepted on the ground that the court had no power to limit argument. The supreme court, however, approved the action of the lower

court, saying that this was a matter within its discretion which in this case had not been abused. The same doctrine prevailed in *Lee v. State*, 51 Miss. 566, where counsel for defendant was limited to thirty minutes in the argument of a larceny case. A limitation upon the argument of counsel on each side to four hours was upheld in *State v. Shores*, 31 W. Va. 491; 13 Am. St. Rep. 875; and to one and three quarter hours in *State v. Hall*, 31 W. Va. 505, upon the same ground. In *Thompson v. Commonwealth*, 88 Va. 45, it was decided that it was within the discretionary power of the court to restrict the argument of counsel to two hours in a case of the trial of a charge of robbery.

The only limitation upon the discretion of the court to limit argument is that the time given must be reasonable and of such length as not to essentially impair the right of argument or deny a full and complete defense. Thus a restriction upon counsel to four hours for the argument of a charge of murder is not unreasonable, nor arbitrary, and may be imposed by the trial court: *State v. Hoyt*, 47 Conn. 518; 36 Am. Rep. 89. A limitation to one and one-half hours in a similar case was upheld on the same grounds: *State v. Collins*, 70 N. C. 241; 16 Am. Rep. 771. The allowance of fifteen minutes to counsel, in a petty case of cutting down timber on school lands, cannot be considered an arbitrary limitation, or as an inhibition to be heard in defense of his client: *State v. Page*, 21 Mo. 257; 64 Am. Dec. 229. Counsel has no right to infer that time for argument is granted beyond that fixed by a rule of court, from the silence of the judge when asked informally as to how much time would be given him, and he cannot complain of the fact on appeal that he was stopped in argument at the end of the time fixed by the rules, especially if he fails to make a request to be given longer time: *Clarke v. State*, 89 Ga. 768.

Counsel should be advised before the argument begins of the limit of time placed thereon, but it is not error, after the defendant's counsel has occupied eight hours in argument, to notify him in his closing address, after he has occupied three hours more, that he will be limited to twenty minutes longer, especially if it is not shown that the accused was prejudiced thereby: *Vaughan v. State*, 58 Ark. 353.

*Unreasonable Limitations.*—Under the rule that the accused in a criminal case has the right to the time necessary for making his defense fully and fairly, and the trial court has the power to prevent the abuse of such right of defense by limiting the argument of his counsel within reasonable bounds, the following cases serve to show what has been deemed to be an abuse of the discretionary power of the court. In *Wingo v. State*, 62 Miss. 311, twelve witnesses were examined on a trial for arson, and the evidence was circumstantial and conflicting. The supreme court decided that it was reversible error in the lower court to limit the argument for the defendant, he being represented by two counsel, to one hour. Such a limitation imposed on the trial of a charge of felony, when the witnesses are numerous and the evidence is conflicting, is an abuse of discretion, demanding the reversal of a judgment of conviction because the prisoner may be thereby deprived of his constitutional right to be fully heard by counsel in his defense: *Dille v. State*, 34 Ohio St. 617; 32 Am. Rep. 395; *Hunt v. State*, 49 Ga. 255; 15 Am. Rep. 677; *McLean v. State*, 32 Tex. Crim. Rep. 521; *Walker v. State*, 32 Tex. Crim. Rep. 175. This doctrine was applied in the case of *People v. Green*, 99 Cal. 564, where a trial of a charge of robbery occupied five days in the trial court, and the examination of twenty-four witnesses, at the conclusion of which counsel for the defendant was limited to one hour

in argument. The rule was applied, and a new trial granted in *People v. Keenan*, 13 Cal. 581, where, under similar circumstances, the argument was limited to one hour and one-half. Again, in a case where an indictment for assault to kill was found upon the evidence of seventeen witnesses, who also testified at the trial, it was decided on appeal that the action of the court below in restricting the argument of counsel for the accused to thirty minutes against his objection was an abuse of discretion abridging the rights of the prisoner, for which a reversal must be granted: *Jones v. Commonwealth*, 87 Va. 63. On a trial for larceny, where nine witnesses were examined, it was held to be error for the trial court to limit the argument of counsel on each side to five minutes: *White v. People*, 90 Ill. 117; 32 Am. Rep. 12. It has been decided that it is reversible error to limit the defendant's counsel to a definite time in his argument before the jury, against his protest that he could not do justice to the case within the prescribed time: *Hunt v. State*, 49 Ga. 255; 15 Am. Rep. 677. This ruling is, however, directly opposed to all other authority examined on this topic. While the trial court has the right to limit argument, it cannot be arbitrarily limited so as to prevent counsel for the defendant from presenting his case to the jury fully and fairly, merely because, in the opinion of the court, the evidence is so clear that argument cannot vary the result: *Walker v. State*, 32 Tex. Crim. Rep. 175.

## PRINCE v. STATE.

[100 ALABAMA, 144.]

**CRIMINAL LAW—ALIBI.**—An instruction that if defendant has failed to establish his alibi, through the perjury or want of recollection of his witnesses, it is a circumstance against him is erroneous, because it may make him suffer for the perjury of others.

**CRIMINAL LAW—ALIBI.**—An instruction that the burden of proof is on the accused to establish his alibi "to your satisfaction" is erroneous in omitting the word "reasonable."

**WITNESSES—CREDIBILITY OF FOR JURY.**—A court should refrain from language calculated to convey to the jury its own impressions as to the credibility of the witnesses.

**CRIMINAL LAW—ALIBI—REASONABLE DOUBT.**—Whenever the evidence introduced to support the defense of an alibi creates a reasonable doubt of the defendant's guilt he is as much entitled to an acquittal as if the reasonable doubt had been created or produced by any other legitimate evidence.

**CRIMINAL LAW—REASONABLE DOUBT—ALIBI.**—The whole evidence, including that relating to an alibi, should be duly considered and weighed, and if, after such consideration, the jury have a reasonable doubt of defendant's guilt, arising out of any part of the evidence, they must acquit.

**JURY TRIAL.—INSTRUCTIONS WHICH SINGLE OUT AND UNDULY EMPHASIZE** any one or more facts are bad.

**CRIMINAL LAW—PROBABLE DOUBT.**—An instruction that, if there is a probable doubt of the guilt of the accused, the jury must acquit is properly refused.



**CRIMINAL LAW—PROBABLE INNOCENCE.**—An instruction that, if there is a probability of defendant's innocence, the jury must acquit is proper, and should be given if requested.

**WITNESSES—EXPERT EVIDENCE.**—A witness who testifies that he has been a practicing physician for many years, and during that time has been called upon to see a few cases of gunshot wounds, but could not by any means by looking at the wound on the deceased tell whether it was made by a rifle ball or a pistol ball, is competent to testify to the character of the wound, but is not competent to give an opinion as evidence that it was caused by a rifle ball.

**EVIDENCE—OBJECTION.**—If a witness in a criminal case testifies that when he entered the house of the accused, soon after the killing, the accused was perspiring freely, and seemed much excited, an objection to the whole of such statement is too broad to be allowed, as the evidence that the accused was perspiring freely is admissible.

**CRIMINAL LAW—EVIDENCE—GENERAL QUESTIONS.**—A question propounded to a witness in a criminal case, by which he is asked "Do you know a fact pointing to the guilt of some one else?" is too general to be allowed, as it constitutes the witness a judge of the effect of a fact.

**CRIMINAL LAW—EVIDENCE—INTEREST IN PROSECUTION.**—If an employee is testifying in a criminal case it may be shown by him that his employer is interested in the prosecution.

*Coleman & Sowell, and W. H. Smith, for the appellant.*

*W. L. Martin, attorney general, for the state.*

145 **COLEMAN, J.** The defendant was convicted of murder in the first degree and sentenced to suffer imprisonment in the penitentiary for life. There was evidence introduced by the defendant which tended to support the defense of an alibi. In its oral charge the court instructed the jury "that if the defendant has failed to establish his alibi through the perjury, or through the want of recollection, of his witnesses it is a circumstance against him," etc. We presume the court intended to declare the proposition, that where a defendant attempts to sustain the defense of an alibi by resorting <sup>146</sup> to perjury, etc., that is a circumstance against him, but the charge as given admits of the construction that, if the defendant's witnesses had sworn truly, the alibi would have been established, and the defendant entitled to an acquittal, but, as they perjured themselves to disprove the alibi, the defendant must suffer for it. If there was credible evidence tending to sustain the alibi the fact that defendant's witnesses may have perjured themselves in testifying to a contrary state of facts cannot be a circumstance to his prejudice. Courts should be careful to refrain from language calculated to convey to the minds of the jurors its own impressions as

to the credibility of the witnesses examined on the trial of the case before it.

The court further charged the jury "that the burden of proof is on the defendant to establish his alibi and that it must be done to your satisfaction." The proof exacted of the defendant in this charge to sustain the alibi is too high, in that it omitted the word "reasonable." If the jury were reasonably satisfied from the evidence that the defendant was elsewhere, and not at the place where the offense was committed at the time it was committed, the burden cast upon him by the law is fully met: *Pellum v. State*, 89 Ala. 28; *Pate v. State*, 94 Ala. 14; *Allbritton v. State*, 94 Ala. 76. The defense of an alibi is as legitimate and effective as any other, and whenever the evidence introduced supports this defense, and its effect is to create a reasonable doubt in the minds of the jury of the defendant's guilt, he is as much entitled to an acquittal as if the reasonable doubt had been created or produced by any other legitimate evidence. We would not be understood as saying that the jury may disregard other evidence in the case, and consider only that in relation to the alibi. The whole evidence should be duly considered and weighed, and if, after considering the whole evidence, the jury have a reasonable doubt of the defendant's guilt, arising out of any part of the evidence, they should acquit: *Hurd v. State*, 94 Ala. 100; *Allbritton v. State*, 94 Ala. 76; *Pate v. State*, 94 Ala. 14.

Courts should avoid as far as possible the singling out and unduly emphasizing any one or more facts, in their instructions to the jury. The court properly refused a charge which instructed the jury: "If there is a probable doubt of the guilt of the defendant the jury must acquit." This charge does not require that the jury shall have a doubt in order to acquit, but that a probable doubt is sufficient, that is, if there is a probability that there is a doubt arising from <sup>147</sup> the evidence, that is sufficient. The charge admits of this interpretation, which is certainly not the law. The court erred in refusing to charge the jury "that if there is a probability of defendant's innocence they must acquit." This question has been passed upon frequently by this court: *Cohen v. State*, 50 Ala. 108; *Bain v. State*, 74 Ala. 38; *William v. State*, 98 Ala. 22.

The witness Whitfield testified that he was a practicing physician of many years, and during that time he had been

called to see a few cases of gunshot wounds. He testified that "he could not by any means by looking at the wound on Bill Lee (the deceased) tell whether it was made by a rifle ball or a pistol ball." In view of this statement we do not think it was competent for this witness to give his opinion that the wound was caused by a rifle ball. He was competent to describe the character of the wound, but, according to his own evidence, he was not competent to give an opinion as evidence that a rifle ball caused the wound. A witness was permitted to testify, against the objection of defendant, that, when he went into the defendant's house, (which was but a short time after the killing) "the defendant was perspiring freely and that he seemed much excited." The objection went to the whole of this statement. That the defendant was "perspiring freely" was a fact to which the witness could testify. The objection applying to that which is obviously legal, as well as to the words "seemed much excited," the court was not bound to separate the one from the other.

We think the rule laid down in the case of *South & North R. R. Co. v. McLendon*, 63 Ala. 266, and followed in the more recent case of *Burney v. Torrey*, 100 Ala. 157, *post*, p. 33, as the more practical and better adapted to further the ends of justice than that declared in the case of *Gassenheimer v. State*, 52 Ala. 313, and *McAdory v. State*, 59 Ala. 92. There are some expressions of speech, and even the use of a word, which convey a distant idea of fact to the mind, much more satisfactory than any attempted description. A person looked "sad," "seemed to be suffering," "looked excited." These are conditions familiar to all. We know what idea is intended to be conveyed. They are facts. What language or words could express the facts any clearer? A cross-examination generally will test the value and weight to be given to statement of facts when given in this way.

The court did not err in sustaining an objection to the question, "Do you know a fact pointing to the guilt of some one else?" The question was too general. It constituted <sup>148</sup> the witness a judge of the effect of a fact. There are some facts, admissible in evidence against a party on trial, which are not admissible as evidence to show that some other person than the defendant on trial was the guilty party. "Flight," for instance. Facts to show that some other person committed the offense may be proven, but whether such

facts exist or not cannot be ascertained by a fishing question. See the following authorities, where this question is discussed and adjudicated: *Banks v. State*, 72 Ala. 526; *Levison v. State*, 54 Ala. 520; *Owensby v. State*, 82 Ala. 63; *Child v. State*, 58 Ala. 349; *Snow v. State*, 58 Ala. 372.

The court sustained an objection to the following question propounded by the defendant to one of the state's witnesses: "State whether the company you are working for is taking any interest in the prosecution of the defendant." In weighing testimony the jury ought to be in possession of all facts calculated to exert any influence upon the witness. It cannot be said as a conclusion of law that an employee testifying in a matter in which he knows his employer is interested personally or pecuniarily is, or is not, wholly unbiased. It is proper for the jury to know the character of the interest of the employer, how it is to be affected, and in what way it is manifested. An employer may act from a sense of public duty, or be interested in seeing that another has a fair trial; or it may be that he is actuated by pecuniary interest, or a spirit of revenge or vindictiveness, and may use his position as employer to bias the evidence of his employee. We think it safe to hold that when an employee is testifying it may be shown that his employer is interested in the prosecution.

Reversed and remanded.

**CRIMINAL LAW—ALIBI—PROOF OF—INSTRUCTIONS AS TO—BURDEN OF PROOF.**—The proof of an alibi in a criminal case is sufficient when it satisfies the jury with reasonable certainty that the accused was not present when the crime was committed. Hence it is error to charge: "The prisoner in this case has attempted to set up an alibi. The court charges you that when the defendant attempts to set up an alibi, that the burden of proof is upon him to satisfy you beyond a reasonable doubt that the alibi is true": *Miles v. State*, 93 Ga. 117; 44 Am. St. Rep. 140. In order to establish an alibi in a criminal case the burden of proof is upon the accused to show facts and circumstances sufficient, when considered with all the other evidence in the case, to create in the minds of the jury a reasonable doubt of the truth of the charge against him: *Carlton v. People*, 150 Ill. 181; 41 Am. St. Rep. 346, and note. See, further, the note to *Sharp v. State*, 14 Am. St. Rep. 41-44.

**CRIMINAL LAW.—REASONABLE DOUBT:** See the notes to *Plake v. State*, 16 Am. St. Rep. 410; *Wacaser v. People*, 23 Am. St. Rep. 683, and *Ross v. State*, 25 Am. St. Rep. 21.

**WITNESSES.—CREDIBILITY OF IS A QUESTION FOR THE JURY:** *Springfield v. State*, 96 Ala. 81; 38 Am. St. Rep. 85, and note; *Gibson v. State*, 39 Ala. 121; 18 Am. St. Rep. 96; *State v. Hossie*, 15 R. I. 1; 2 Am. St. Rep. 838, and note.

## BURNES V. TORREY.

[100 ALABAMA, 157.]

**WILLS—TESTAMENTARY CAPACITY—FRAUD AND UNDUE INFLUENCE.**—If testamentary incapacity exists there is no room for the operation of fraud or undue influence in the execution of a will, and evidence respecting it is immaterial.

**A WILL IS EXECUTED UNDER UNDUE INFLUENCE** if the testator has testamentary capacity, but his power to exercise it has been overcome by force or fear, or the desire for peace, or some improper influence not proceeding from affection.

**WILLS—UNDUE INFLUENCE.**—A bequest or devise procured by fraud and deceit, such as, without the imposition, would not have been made, even though there is neither force nor fear brought to bear, is procured by undue influence, and cannot be sustained.

**WILLS—REQUISITES.**—Sufficient capacity, free agency, without the imposition of fraud or deceit, are the elements of a valid will.

**WILLS—UNDUE INFLUENCE—WHAT IS NOT.**—One who, by forethought and affectionate attention, and provision for the wants of another, and by integrity, acquires his confidence and a controlling influence over him, using no deceit, is not guilty of exercising undue influence.

**WILLS—UNDUE INFLUENCE.—AN UNEQUAL DISTRIBUTION** of his property by a testator, or his omission entirely from his bequests of some of his next of kin, is not, in the absence of mental incapacity or undue influence, evidence to show either testamentary incapacity or undue influence.

**WILLS—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—UNEQUAL GIFTS.** Although the evidence may tend to show some impairment of the mind, if testamentary capacity remains, the fact that there has been an unequal distribution of property by will does not authorize the conclusion that such disposition was the result of fraud or undue influence. To justify this conclusion there must be other evidence tending to show that the will of the testator was unduly coerced, or that there was fraud and deceit practiced in its procurement.

**WILLS—TESTAMENTARY CAPACITY DEFINED.**—One who at the time of executing a will has mind and memory sufficient to recall and remember the property he is about to bequeath, the object of his bounty, and the disposition which he wishes to make, to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relations of its elements to each other, has a sound and disposing mind and memory.

**WITNESSES.—TO IMPRACH A WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS** they must be material to the issue.

**WITNESSES—OPINIONS INVADING THE PROVINCE OF THE JURY.**—An instruction on a will contest that the opinions of persons not experts on the question of insanity, though ever so honestly formed, are most unsafe guards for the ascertainment of the truth, and that to render such opinions legal evidence they must be accompanied by the facts or circumstances upon which they are based, is erroneous as invading the province of the jury, and should not be given.

**WITNESSES—INVADING THE PROVINCE OF THE JURY—EXPERTS ON INSANITY.**—An instruction on a will contest that common experience has

shown and courts have often remarked, that opinions of professional witnesses upon questions of insanity have become of little practical value, from the almost universal conflict between those called upon the different sides, as compared with the testimony as to the acts and sayings of the person whose mind is under investigation, is erroneous, as invading the province of the jury, and should not be given.

**WILLS—WEIGHT OF EVIDENCE OF ATTESTING WITNESS.**—The testimony of a witness who has attested a will should be weighed and considered the same as that of any other witness. The fact that he is an attesting witness, of itself, does not entitle his evidence upon the question of testamentary capacity to greater weight than it would otherwise be entitled to, except that by reason of his being an attesting witness the law authorizes him to give his opinion of the mental capacity of the testator.

**WILLS—TESTAMENTARY CAPACITY—OPINION EVIDENCE.**—If a witness has had such a long and intimate acquaintance with a testator as to enable him to form a correct judgment as to the testator's mental condition, he may give his opinion that the testator is of sound mind, provided he also states the facts upon which such opinion is based.

**WILLS—UNEQUAL BEQUESTS—EVIDENCE TO ACCOUNT FOR.**—If, in a contest over a will by which the testator's widow is made the sole beneficiary to the exclusion of his son, it appears that the latter has deserted his first wife and two children, a clipping from a newspaper to the effect that he has married another woman is admissible in evidence as tending to account for the fact that the testator made no provision for him in his will.

**WILLS—TESTAMENTARY CAPACITY—EVIDENCE.**—Witnesses well acquainted with a testator are competent to testify that he was "childish"; that his expression "was simple," or that he was a "shrewd business man," as tending to show his testamentary capacity.

**WILLS—TESTAMENTARY CAPACITY—OPINION OF NONEXPERT.**—A witness, not an expert, cannot be asked, for the purpose of showing a testator's unsoundness of mind, whether he seemed to have his mental faculties about him all of the time, unless it is first shown that the witness had an opportunity to know, accompanied with a statement of facts upon which the opinion is based.

**CONTEST of a will.** Judgment declaring the will invalid, and the executors appealed. The proponent of the will requested the court below to give the jury the following instructions, and excepted to the refusal of the court to so charge: 1. "The proponents request the court to charge the jury that the opinions of persons, on the question of insanity, who are not experts, though ever so honestly formed, are most unsafe guides for the ascertainment of truth, and that to render the opinions of witnesses, in such cases, legal evidence, such opinions should be accompanied by the facts or circumstances upon which they are based." 3. "In the case on trial, Mr. Torrey, the testator, is presumed to be of sound mind and disposing memory, and competent to make the will in ques-

tion; and unless the contestant has proved to the satisfaction of the jury, by the evidence in this case, that Mr. Torrey had not sufficient mind and memory, at the time the will was made, to know the beneficiary (his wife), and to know his property, and to know what business he was engaged in, the jury will find for the proponents on the issue of the want of testamentary capacity." 4. "That common experience has shown, and the courts have often remarked, that opinions of professional witnesses upon questions of insanity have become of little practical value upon such trials, from the almost universal conflict between those called upon the different sides, as compared to the testimony of the other kind, consisting of the acts and sayings, things done and said by him, the consideration of whose mind is under investigation." The contestant requested the court below to charge the jury as follows, and to the giving of them the proponent excepted: 2. "If the jury believe from the evidence that, at the time of the execution of the will offered for probate, Samuel Torrey was of unsound mind, and by reason of such unsoundness of mind he did not have an intelligent knowledge of the act he was engaged in and of the property he possessed, and an intelligent perception and understanding of the disposition he desired to make of it and the persons he desired to be the recipients of his bounty, and the capacity to recollect and comprehend the nature of the claims of those who are excluded from participating in his bounty, they must find in favor of the contestant, Warren Torrey." 9. "Mental incapacity is always sufficient to defeat a will, the direct offspring and fruit of such incapacity; and it is immaterial that the testator, if he had been of sound mind, would have made the same will. A will which is the direct offspring of such incapacity cannot be upheld merely because the jury believe the testator, if he had been sane, would have made the will." "15. I charge you, gentlemen of the jury, that the fact that B. F. Roden attested the will of Samuel Torrey as a witness does not furnish any evidence of any opinion he had as to the sanity of Samuel Torrey. No inference as to Roden's opinion as to the testator's sanity or insanity can be drawn from the mere fact of attesting the will as a witness; and the testimony of B. F. Roden is entitled to the same weight as it would have been if he had not been an attesting [witness?] to the will." 21. "The law does not lay down a special test or gauge of testamentary capacity, or of what acts, conduct,

or surroundings will constitute undue influence. Each case must be determined according to its own peculiar facts and circumstances, having in view the single fact that no instrument can be established as a will unless it speaks the free and voluntary purpose of the testator. And if such instrument is offered for probate, and is contested on the ground of unsoundness of mind and undue influence, and the jury believe that such instrument is offered for probate by parties occupying confidential relations to the deceased at the time of the making of the alleged will and receiving benefits therefrom, the existence of such confidential relations, coupled with activity on their part in the preparation of the will, and in obtaining the attesting witnesses, will raise a presumption of undue influence, and cast upon them the burden of showing that it was not induced by undue influence on their part, directly or indirectly."

*Webb & Tillman and W. D. Bulger*, for the appellants.

*Bush & Brown and H. C. Selheimer*, for the appellee.

<sup>167</sup> COLEMAN, J. Appellants offered to probate an instrument as the last will and testament of Samuel Torrey. The probate was contested by Henry W. Torrey, a son of deceased by a former wife to the one which survived the deceased, and who was made the sole beneficiary under the instrument offered for probate as his will. The grounds of contest were: 1. That the instrument was not legally executed; 2. Want of testamentary capacity; 3. Fraud and undue influence.

The record is voluminous, and the assignments of error unnecessarily numerous, many raising the same legal questions. We will consider the important questions.

<sup>168</sup> The court correctly instructed the jury that the will was properly executed. The court was also requested by the proponents to charge the jury that there was no evidence before them to sustain the contest upon the grounds of undue influence. We are of opinion that this charge should have been given, and, if correct in this conclusion, it disposes of many of the assignments of error, without a special examination of them. In considering the question of fraud and undue influence it should be kept in mind that, when testamentary incapacity exists, there is no room for the operation of undue influence or fraud. It is only to such persons as have testamentary capacity, and who have been deceived by



fraud or unduly influenced, and thus prevented from freely exercising such capacity, that evidence of undue influence or fraud is relevant and material. In the one case the will is invalid for want of testamentary capacity. In the other the person has testamentary capacity, but the will power to exercise it has been overcome, by force or fear, or the desire for peace, or some improper influence not proceeding from affection, and the party is constrained, or by fraud induced, to make the will. This is undue influence. A bequest or devise, procured by fraud and deceit, such as, without the imposition, would not have been made, even though there is neither force nor fear brought to bear, is undue influence, and will avoid the instrument as a will. Sufficient capacity, free agency, without the imposition of fraud or deceit, are the elements of a valid will.

It is a great mistake of the principles of law under consideration, as applicable to wills, to suppose that a person who by forethought and affectionate attention, and provision for the wants of another, and by integrity, acquires the confidence of such person, and a controlling influence over him, using no deceit, is in the exercise of what in law is termed "undue influence." Such a doctrine would place a premium on neglect and indifference, and "rob virtue of its reward."

What are the facts? Samuel Torrey lived to be some thing over sixty years of age. During the month of September, 1890, he had a paralytic stroke. He never physically recovered entirely from the stroke. Whether he did or not, mentally, is controverted. He survived the stroke about two years, and died, according to some of the evidence, from bilious fever. Prior to the time of the attack of paralysis the uncontroverted evidence is, that he was an energetic, good business man, self-reliant, and entirely independent of the influence of his wife, or any other person, in his business matters. The undue influence, if any was exercised by <sup>189</sup> his wife, is conceded to have been, and must have been, after the paralytic stroke. We have examined the record carefully, and the brief of counsel with special reference to this question. In our opinion there is nothing in the record to support the contention of undue influence. Very few facts are referred to in the argument for appellee on this question, and these we will consider. The first and most prominent is, that the wife was the sole beneficiary under the will, the testator knowing that he had a son living (the contestant),

or, if the testator supposed him dead, then he knew that this son had left two children, testator's grandchildren. The fact that a testator makes an unequal distribution of his property, or omits entirely from his bequest some of those who are next of kin, standing alone, is not legal evidence tending to show either testamentary incapacity or undue influence. It is only when there is other evidence tending to show mental incapacity or undue influence that the fact that he had not disposed of his property equally becomes a fact to be considered in connection with such other evidence. If the testator had expressly declared in his will "that he had a son somewhere living," or, if he was dead, that "he had two grandchildren who were very dear to him, yet, for reasons satisfactory to himself, he devised and bequeathed all his property to his wife," would the will be rejected, when offered for probate, because of such a statement, or would such a statement in the will put the burden upon the proponent to show that testator was of sound mind or had not been unduly influenced, or had not been deceived? Clearly not. A person of testamentary capacity, and which the law presumes every one to possess, has the right to make unequal gifts of his property, if he sees proper to do so, by testamentary disposition, and the fact that he does so does not *per se* establish nor authorize the inference that the donor is of unsound mind, nor that the gift was the result of fraud, nor of undue influence. In case of wills other evidence is necessary to justify such a conclusion: *Eastis v. Montgomery*, 93 Ala. 293; *Bancroft v. Otis*, 91 Ala. 279; 24 Am. St. Rep. 904; *Coleman v. Robertson*, 17 Ala. 87; *Kramer v. Weinert*, 81 Ala. 417; *Roberts v. Trawick*, 13 Ala. 78; *Taylor v. Kelly*, 31 Ala. 59; 68 Am. Dec. 150; *Leeper v. Taylor*, 47 Ala. 221.

The other fact referred to in brief of counsel was a declaration made by Mrs. Torrey to her husband, the testator. It appears that at the time of the attack these parties were living out on the Highlands of Birmingham, some distance from the business part of town, and, some time after the stroke, one Lockwood, the uncle of the contestant, testifies<sup>170</sup> that he "heard her say to Mr. Torrey he must go down to the Kimball House, that she could n't live out there and attend to his business in town for him." The Kimball House was the property of the testator, and convenient to the business part of town. It was rented out as a boarding-house. Testator owned other considerable real estate in the city,

which was rented out. The move to the Kimball House was soon after the attack of paralysis, and many months before there was any step taken in reference to the making of a will. We can see nothing in this statement, if true, which tends to show fraud, deceit, coercion, or imposition of fear, to influence the testamentary disposition of his property. Certainly when the testator sent for his nephew, who was an attorney, to write his will, there is no evidence to show that his wife knew of his purpose, or was present when he gave instructions as to the disposition of his property, or had any thing to do with sending for the attesting witnesses, or was present at the time the will was signed and attested, or advised him in regard to the disposition of his property, or made any suggestion at any time relative thereto.

The proposition we declare is, that although the evidence may tend to show some impairment of the mind, if testamentary capacity remains, the fact that there has been an unequal distribution of property does not authorize the conclusion that such disposition was the result of fraud or undue influence. There must be other evidence tending to show that the will of the testator was unduly coerced, or that there was fraud or deceit practiced in its procurement. To hold otherwise would lay down a principle which would authorize the setting aside of every will, on the grounds of fraud or undue influence, when any impairment of mental vigor was shown, although the testator possessed testamentary capacity, unless the disposition of his property accorded with what, in the opinion of the jury, it should have been.

We will next consider the principles of law declared by the trial court, as to what constitutes testamentary capacity. We consider the charge given by the court *ex mero motu*, with the exception of what we believe to be a clerical error, to be a clear and correct statement of the law of testamentary capacity. The clerical error is in writing, "valid" for "invalid." The whole charge and the context show that "invalid" was the word used by the court. We are of opinion the rule declared in laying down the mode for the impeachment of witnesses is too broad. In order to impeach a witness by showing that he has made contradictory statements the <sup>171</sup> statement made must be material to the issue. It is not every contradictory statement made, but only those relative and material, which is the basis for proof of contradictory statements.

The difficulties on this branch of the case arise from written charges "given" or "refused" prepared by counsel.

We are of opinion the charges upon the question of testamentary capacity requested by proponent were properly refused. The first and fourth charges are in language copied from the opinion of the court in *Roberts v. Trawick*, 13 Ala. 85. An examination of the case will show that the court was laying down a rule for the trial court, and giving the reasons for the admission or rejection of certain facts as evidence, and not a rule for the guidance of juries, after such evidence has been admitted. The charges invaded the province of the jury, and were properly refused.

The second was erroneous in requiring the contestants to prove more than the law requires. When the law predicates certain facts, and declares their existence to be evidence of testamentary capacity, the rule does not impose upon a contestant the burden of affirmatively showing the nonexistence of all the facts predicated. The correct inference from the rule declared is, that, if the testator is wanting in either of the specified constituents, he does not possess all that is necessary to constitute testamentary capacity. The affirmative charges, which instructed the jury generally to find for proponents, were properly refused.

If the phrases "intelligent knowledge," "intelligent perception and understanding," "intelligent comprehending," were intended to make the standard of testamentary capacity higher than it would be, by the omission of the word "intelligent" from the charges in which it occurs in the connection mentioned, then the charges should have been refused on this account. The connection in which these phrases were used was calculated to make this impression on the minds of the jurors and to mislead them, and the charges should have been refused. In the case of *Kramer v. Weinart*, 81 Ala. 414, this court condemned a charge which required as a test, that the testator must "know and understand the business she then had in view, and to think and act on that business soundly." The rule which prevails in this state, and is supported by the great weight of authority, is, that, if the testator has mind and memory sufficient to recall and remember the property he is about to bequeath, the objects of his bounty, the dispositions which he wishes to make, to know and understand the business he is engaged in, the consequences<sup>173</sup> of the business to be performed, he has, in

contemplation of law, a sound and disposing mind and memory. These elements include a power to know and discern their obvious relation to each other. The law is clearly and fully stated in *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150, and, though different expressions have been used in later decisions, none were intended to alter or add to the requisites there declared. Charge 15 requested by contestants is similar to charge No. 9, which was given in *Bancroft v. Otis*, 91 Ala. 279; 24 Am. St. Rep. 904. The principle of law asserted in the charge may be correct, but is necessarily abstract, and should be refused. The jury have no right to consider the question as to the character of a will an insane man would have made had he possessed testamentary capacity. The question is purely speculative, and cannot aid in determining the fact of sanity, *vel non*.

Several of the charges given for contestant upon the question of undue influence are subject to criticism, but we have not considered it necessary to pass in detail upon them, as this feature of the contest will not arise upon another trial, unless there is additional evidence introduced.

The testimony of a witness who attested the will should be weighed and considered as that of any other witness. The fact that he was an attesting witness, of itself, does not entitle his evidence upon a question of testamentary capacity to greater weight than he would otherwise be entitled to, except perhaps that, by reason of his being an attesting witness, the law authorizes him to give his opinion of the mental capacity of the testator. Charge 21 should have been refused. If the person referred to as occupying confidential relations to testator is the wife the charge is abstract. If it refers to other persons it is abstract and erroneous, as the wife is the sole beneficiary under the will. The executors were simply agents to execute it: *Roberts v. Trawick*, 13 Ala. 80.

We will next consider the assignments of error upon the admission and exclusion of evidence. We think the proper rule as to nonexperts testifying upon the sanity or insanity of a person may be stated as follows: Where there has been that long and intimate acquaintance with another to enable the formation of a correct judgment as to the mental condition of such other person a witness may give his opinion that the person is of sound mind. Sanity is the normal condition of mankind. The witness with such opportunities

need not ~~in limine~~ be required to testify to the absence of facts which, if existing, would be <sup>172</sup> evidence of insanity, before giving his opinion that the person is sane. To authorize a nonexpert to give his opinion of the existence of an unsound condition of mind he must not only have had the opportunity to form a judgment but the facts should be stated upon which it is based. The admission of opinion testimony is an exception to the general rule, and, in our judgment, the ends of justice require in all cases where the opinion of a nonexpert is admissible to show unsoundness of mind, that the facts upon which it is predicated should be stated. The case of *Stubbs v. Houston*, 33 Ala. 564, is not an authority adverse to the proposition. It is there stated "that it was competent for him to give his opinion in connection with facts deposed to by him." The former of the propositions was the question before the court in the case of *Ford v. State*, 71 Ala. 397.

The rule, as to the latter proposition, as we have stated it, was distinctly declared in *Roberts v. Trautick*, 13 Ala. 85; *Powell v. State*, 25 Ala. 21; *Florey v. Florey*, 24 Ala. 247. A nonexpert, however long or intimately acquainted, who states no facts and circumstances, upon which the opinion is based, is not competent to testify that, in his opinion, a party is insane. The weight to be given to the opinion of a nonexpert as to mental capacity, when admissible, will depend upon the extent and character of the impairment of the mind, the opportunity to know, the intelligence of the witness, and the reasonableness of the conclusion from the facts stated, and accompanying the opinion: *Powell v. State*, 25 Ala. 27. The rule is easily understood, and what we have said will be sufficient to guide the court on another trial.

There was no error in allowing the witness Lockwood to prove that Roden had made a contradictory statement. The predicate was laid, the question of fact material. It was for the jury to say how far the testimony of the witness Roden was impeached by the witness Lockwood. There was no error in allowing the question in rebuttal, to Lockwood: "If he had information that Darby knew important facts," etc. On cross-examination this witness had been asked, "If he did not say he would give one hundred dollars to know to what Darby would testify." Having answered in the affirmative we can see no objection to the explanation. The deo-

larations of Mrs. Torrey not made in the presence of Mr. Torrey were mere hearsay, and not admissible as original evidence to prove any fact. As impeaching testimony there was no predicate for their introduction. It was not competent to prove property in Mrs. Torrey by a declaration of Mr. Torrey to the effect that it was his custom when he <sup>174</sup> purchased property to take title of alternate purchases in her name. It was competent to prove by legal evidence, that he had provided for her, and the extent of the provision. It was also competent to prove that she assisted him to make the property, and his declarations to this effect. We are of opinion the court erred in excluding the clipping from the Memphis newspaper. This may have been important testimony to either party upon the different issues. It appears that Warren Torrey had left his wife and two children at Cullman some ten or more years before the death of the testator. Not many years after he left his family, as Mrs. Torrey offered to testify, she received in a letter a clipping from a Memphis paper which was offered in evidence, and which was read by testator, to the effect that Warren Torrey had married again in that city. The letter was not produced. The court sustained an objection to the clipping, it would appear, upon the ground that it was hearsay. This clipping was not admissible as competent evidence to prove the second marriage as a fact. But why was it not competent as tending to account for the fact that testator made no provision for him in his will? If the clipping was true or believed by Mr. Torrey it may have influenced his mind. On the other hand, if it was a fabrication gotten up to prejudice testator, and he was imposed upon by it, we are not prepared to say such information, brought to him under such circumstances, was not admissible on the issues prosecuted. It would seem the facts proposed to be deposed to were admissible for either party. In the case of *South & North R. R. Co. v. McLendon*, 63 Ala. 266, it was held that a witness could testify that "plaintiff seemed to be suffering," she "looked bad," etc. Under the principle decided in that case we hold it was permissible for a witness to say that the testator "was childish," that his expression "was simple," that he was a "shrewd business man," etc. These words convey a distinct idea. On cross-examination the value or correctness of such conclusions may be brought out. We do not think, however, that the principle upon

which these "shorthand" rendering of facts are admissible can be extended so far as to permit a nonexpert witness to be asked, for the purpose of showing unsoundness of mind, "Did he seem to have his mental faculties about him all the time," except it be first shown, that the witness had the opportunity to know, under the principles we have declared, accompanied with a statement of facts, upon which the opinion is based.

<sup>178</sup> For the errors pointed out the case must be reversed and remanded.

Reversed and remanded. —

**WILLS—UNDUE INFLUENCE—WHAT IS.**—Undue influence to invalidate a will must be such as to control the mental operations of the testator, and amount to a substitution of the will of the dominant over the weaker mind: *Fry v. Jones*, 95 Ky. 148; 44 Am. St. Rep. 206, and note. See the extended note to *In re Hess' Will*, 31 Am. St. Rep. 670, for a full discussion of this subject.

**WILLS—TESTAMENTARY CAPACITY.**—To establish testamentary capacity it is only necessary that the testator had sufficient capacity to comprehend the condition of his property, the persons who should or may be the objects of his bounty, and the scope and bearing of his will: *McMaster v. Scriven*, 85 Wis. 162; 39 Am. St. Rep. 828, and note, with the cases collected. To the same effect, see *In re Cline's Will*, 24 Or. 175; 41 Am. St. Rep. 851, and note.

**WILLS—UNEQUAL BEQUEST AS EVIDENCE OF TESTAMENTARY INCAPACITY.** Although a testator may not, in his will, dispose of his property equally to his next of kin, that fact alone does not raise a presumption of mental incapacity or undue influence, but must be considered with other facts in determining that issue: *Knox v. Knox*, 95 Ala. 495; 36 Am. St. Rep. 235. See also, the note to *Grandall's Appeal*, 38 Am. St. Rep. 378.

**WILLS—UNDUE INFLUENCE—EFFECT OF KIND OFFICES.**—Undue influence in the execution of a will is not proved by disclosing relations of friendship and affection between the parties and by showing kindly offices and proper conduct on the part of the devisee toward the testator: *Goodbar v. Lidikry*, 136 Ind. 1; 43 Am. St. Rep. 296. See the extended note to *In re Hess' Will*, 31 Am. St. Rep. 676.

**WITNESS.—IMPEACHMENT WHEN HE DID NOT TESTIFY TO ANY MATERIAL FACT:** *Davis v. Commonwealth*, 95 Ky. 19; 44 Am. St. Rep. 201.

**WITNESSES—EXPERTS—INSTRUCTIONS AS TO CREDIBILITY OF.**—An instruction that the evidence of expert witnesses is "to be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous" is fatally erroneous, as expert evidence is to be received and treated by the jury precisely as other testimony: *Louisville etc. Ry. Co. v. Whitehead*, 71 Miss. 451; 42 Am. St. Rep. 472, and note, with the cases collected.

**WILLS.—EVIDENCE OF ATTESTING WITNESS AS TO TESTATOR'S CAPACITY:** See the note to *Grandall's Appeal*, 38 Am. St. Rep. 379.



## BIRMINGHAM LOAN & AUCTION COMPANY v. FIRST NATIONAL BANK.

[100 ALABAMA, 249.]

**AN AMICUS CURIE IS ONE WHO**, as a stander by, when a judge is doubtful or mistaken in a matter of law, may inform the court.

**AN AMICUS CURIE HAS NO CONTROL OVER THE SUIT**, and no right to appeal, prosecute a writ of error, or institute other proceedings thereon.

**AMICUS CURIE.—EXCEPTIONS TAKEN BY AN AMICUS CURIE** cannot avail his client on appeal.

**PARTNERSHIP NAME.**—The name "Birmingham Loan & Auction Company" fairly imports a partnership.

**PARTNERSHIP NAME ORDINARILY IMPLIES MORE THAN ONE PERSON**, yet the name under which one person does business is arbitrary, and, if he uses a name that implies a partnership, the reputed firm may be sued under such name, and execution on the judgment obtained runs against the partnership in name leviable only on its property, being in the nature of a proceeding *in rem*, and not *in personam*.

**APPEAL.—WAIVER OF ERROR.**—He who goes to trial on the merits without objection to defects in the proceedings of the lower court thereby waives the right to raise such objection on appeal.

**PLAINTIFF**, the First National Bank, obtained a judgment against one Goetter for one hundred dollars before a justice of the peace. Plaintiff then sued out a writ of garnishment, naming the Birmingham Loan & Auction Company as garnishee. The garnishee answered by its manager, S. Kaufman, who, being duly sworn, denied any indebtedness to Goetter. Plaintiff replied contesting this answer, and, on the trial, obtained judgment against the garnishee for one hundred dollars and costs. The garnishee then appealed to the Birmingham city court, and, when the case was there called for trial, A. H. Benners, an attorney, appeared as *amicus curiæ*, and moved a dismissal of the case, on the ground that the said garnishee was a fictitious person. The court overruled this motion, and Benners excepted, and appealed on behalf of the garnishee.

*A. H. Benners*, for the appellant.

*A. E. Barnett*, for the appellee.

<sup>250</sup> **HARALSON, J.** 1. An *amicus curiæ*, in practice, is one who, as a stander by, when a judge is doubtful or mistaken in a matter of law, may inform the court: Bouvier's Dictionary. "He <sup>251</sup> is heard only by leave, and for the assistance of the court, upon a case already before it. He has no

control over the suit, and no right to institute proceedings thereon, or to bring the case from one court to another by appeal or writ of error": *Martin v. Tapley*, 119 Mass. 116; Lawson's Rights and Remedies, sec. 150.

2. The attorney for the garnishee, as *amicus curiæ*, moved to dismiss the suit, on the ground that it was a fictitious one, and the garnishee was a fictitious person. The court overruled the motion, and, as *amicus curiæ*, the attorney excepted. The garnishee, against whom judgment was rendered, assigns this ruling as error.

The *amicus curiæ*, in making this motion, was acting in the interest of his client, to aid him, more than to rescue the court from doubt and mistake; but, conceding his friendliness to the court to have been disinterested, after his motion was overruled his friendly offices were at an end. He had no interest which authorized him to except to the ruling of the court on his motion, nor can the garnishee in this court assign that ruling as error. Not having made the motion, and not having complained of the court's action on the motion, the ruling is not available on error to the garnishee: *Eslava v. Farley*, 72 Ala. 214.

3. The name of the Birmingham Loan & Auction Company fairly imports a partnership: *Clark v. Jones*, 87 Ala. 474; *Seymour v. Thomas-Harrow Co.*, 81 Ala. 250.

The proof showed that S. Kaufman, during the time covered by the garnishment writ, did business under that name. The name of a firm or partnership ordinarily implies more than one person, but still the name under which one person does business is arbitrary, and, if he uses a name that implies a partnership, the reputed firm may be sued under such name, and execution on the judgment obtained will run against the partnership in name, leviable only on its property, being in the nature of a proceeding *in rem*, and not *in personam*: *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Moore v. Watts*, 81 Ala. 261; *Pugh v. Youngblood*, 69 Ala. 296; Code, sec. 2605.

4. The garnishee filed an answer by S. Kaufman, manager, denying any indebtedness, which answer was contested by plaintiff, setting out several grounds wherein it was alleged to be untrue. On these the garnishee took issue. It executed an appeal bond from the justice's to the city court, and appeared by attorney. Having gone to trial on the merits, without having taken objection to any supposed defect in the

lower court, the garnishee waived it, and cannot raise <sup>353</sup> the point first here: *Hazard v. Franklin*, 2 Ala. 349; *Marston v. Carr*, 16 Ala. 325; *Ortiz v. Jewett*, 23 Ala. 662; *Ware v. St. Louis B. etc. Co.*, 47 Ala. 667; *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Moore v. Watts*, 81 Ala. 261.

5. The attempt to evade liability as a garnishee in this instance was extremely technical, too much so for justice to close her eyes against. Kaufman, who did business under this assumed name, made oath, as manager of garnishee—the proof showing that he was the firm—that his company owed the judgment debtor nothing, was not indebted to him at the date of the service of garnishment, had never paid him any money, and yet admitted that he was working in the store of the company; and the proof tended to show that the debtor was paid by Kaufman in that time over four hundred dollars. The finding of the court that the answer was untrue was correct. This case is clearly distinguishable from *Ex parte Collins*, 49 Ala. 69.

The only ground of error insisted on in argument is the one that the defendant was a fictitious person.

There is no error in the record, and the judgment is affirmed.

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**PARTNERSHIP—EFFECT OF USE OF PARTNERSHIP NAME.**—When a married woman carries on business under the assumed partnership name of “S. & Co.,” she may be sued in the partnership name, and cannot plead her coverture in defense of the action as against creditors who have dealt with her on the faith of it: *Le Grand v. Eufaula Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140, and note.

**APPEAL—WAIVER OF ERROR.**—An objection not made in the trial court will not be considered on appeal: *Coad v. Home Cattle Co.*, 32 Neb. 761; 29 Am. St. Rep. 465; but are deemed waived: *Fleming v. Springfield*, 154 Mass. 520; 26 Am. St. Rep. 268; *London v. Yeomans*, 31 S. C. 147; 17 Am. St. Rep. 17, and note.

## TENNESSEE COAL, IRON & RAILROAD COMPANY v. HAMILTON.

[100 ALABAMA, 252.]

**WATER RIGHTS.**—WATER IS THE COMMON AND EQUAL PROPERTY of every one through whose domain it flows, and the right of each to its use and consumption, while passing over his possessions, is the same. He must not so use it as to destroy or unreasonably impair the equal rights of others.

**WATER RIGHTS.**—EVERY RIPARIAN PROPRIETOR has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity, or alteration in quality, subject to the limitation that each is entitled to the reasonable use of the water for domestic, agricultural, and manufacturing purposes.

**WATERCOURSES—OBSTRUCTION AND CORRUPTION OF.**—Any diversion or obstruction of water which substantially diminishes the volume of a natural stream so that it does not flow *ut currere solebat*, or which defiles or corrupts it to such a degree as to essentially impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, is an infringement of the right of other owners of land through which the watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy.

**WATERCOURSES—RIPARIAN RIGHTS—CONFLICT BETWEEN.**—The natural right of one proprietor to have a natural stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors, whose fertilization, cultivation, or occupation of their lands, and whose use of the stream for mill and manufacturing purposes, for irrigation and domestic purposes, tends to make the water more or less impure, or to diminish its quantity, especially when the population becomes dense. Such proprietors can be held responsible only for appreciable injury caused by their works and not for slight inconveniences or occasionable annoyances.

**WATERCOURSES—RIPARIAN RIGHTS TO MINE—POLLUTION.**—An upper riparian proprietor has the right to use the water of a natural stream for mining purposes, although he thereby impairs its purity to a limited extent; but he has no right to so pollute the stream as to render it unfit for domestic purposes to the lower owner, or to so fill up the channel as to cause injurious debris to be deposited on his land.

**WATERCOURSES—RIPARIAN RIGHTS—CONTRIBUTORY NEGLIGENCE.**—In an action by a lower owner against an upper owner, to recover for the pollution of a natural stream and for depositing injurious debris on his land, a plea that such lower owner is guilty of contributory negligence in failing to take due precaution to prevent such injury is insufficient and unavailing to avoid a recovery.

**WATERCOURSES—LIABILITY FOR DEPOSITING DEBRIS—DEFENSE THAT OTHERS CONTRIBUTED TO THE INJURY.**—In an action by a lower owner against an upper owner, to recover for the pollution of a natural stream and for injury arising from a deposit of debris on his land, the upper owner may prove that another upper owner contributed to the injury independent of his own acts, and thus limit the amount of recovery against himself to the actual injury inflicted by him.

**EVIDENCE—BURDEN OF PROOF.**—If a defendant denies all of the allegations of plaintiff's complaint the burden of proof is on plaintiff to establish all of his averments.

**WATERCOURSES—POLLUTION—MEASURE OF DAMAGES.**—In an action to recover for the pollution of a natural stream and an injurious deposit of debris the question whether such unsanctioned interference enhances or diminishes the value or the comfort of the occupation of the land is an inquiry which may enter into the computation of damages, but it is not the sole criterion of damage nor any test of the right to maintain an action for the tort committed.

**WATERCOURSES—POLLUTION—DAMAGES.**—After the pollution of a natural stream by an upper proprietor and an injury from deposits of debris has ceased the lower owner can recover only for such pollution while it existed and for the injury from the debris until such time as it is washed away or otherwise disposed of.

*Hewitt, Walker & Porter, and R. H. Pearson, for the appellant.*

*Logan, Hargrove & Van de Graaff, for the appellee.*

<sup>257</sup> **STONE, C. J.** The contesting parties in this case severally owned tracts of land in Bibb county that were contiguous to each other. A stream of water known as Caffee's creek runs through the two tracts, the Coal, Iron & Railroad company being the upper, and Mrs. Hamilton the lower, riparian proprietor. The Coal, Iron & Railroad company was engaged in mining iron ore from its lands, and had erected and was operating a washer, for washing the ore mined by it. This washer was situated near Caffee's creek, was supplied with water from it; and the water so used, after being somewhat detained for settling purposes, was permitted to flow back into the stream below the washer, but before it reached Mrs. Hamilton's land. Mrs. Hamilton was engaged in agriculture, owned stock, and complains that she had on her lands no water, save Caffee's creek, that was convenient and suitable for watering her stock, without incurring serious additional expense. This action was brought by her, and she avers, that, by the use of the water in the washer of the Coal, Iron & Railroad company, it became and was polluted to such extent that stock would not drink it, and further, that it left a deposit in the bed of the stream and on the land that injuriously affected her. Whether the defendant corporation, in the process of washing its ore, polluted the stream to such extent as to give to Mrs. Hamilton a right of action was the main question in this case. There was testimony, <sup>258</sup> that, by the operation of the washer, the water was

made so foul that stock would not drink it; that the deposit tended to fill up the bed of the stream and to cause an increase of overflow in freshets, and that it made the bed of the stream miry, so that cattle would not enter the stream. There was conflict of testimony on these questions. On the other hand there was testimony for the corporation that the ore they were mining was valueless without washing; that this creek was the only available water supply for that purpose, and that there was no outlet for the water after it left the washer but to let it flow back into the creek. Their testimony tended further to show that they resorted to the customary and best means of purifying the water before permitting it to flow back into the creek.

The old maxim, *aqua currit, et debet currere ut solebat*, is familiar to all. It means, in practical application, that water is the common and equal property of every one through whose domain it flows, and that the right of each to its use and consumption, while passing over his possessions, is the same. He must so use it as not to destroy, or unreasonably impair, the equal rights of others. *Sic utere tue ut alienum non lædas* is the law's mandate in such conditions: *Stein v. Burden*, 29 Ala. 127; 65 Am. Dec. 394.

In these modern times there has been some slight relaxation of the rules regulating the use of water and of water-courses. Speaking on this subject we, in *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 11 Am. St. Rep. 72, said: "The general rule is often stated to be, that every riparian proprietor has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity, or alteration in quality. But this rule is qualified by the limitation, now well recognized, that each of such proprietors is entitled to a reasonable use of the water for domestic, agricultural, and manufacturing purposes; or, to state the rule in the words of Shaw, C. J., in *Cary v. Daniels*, 8 Met. 466, 477, 41 Am. Dec. 532, 'Each proprietor is entitled to such use of the stream, so far as it is reasonable, conformable to the usages and wants of the community, and having regard to the progress and improvement in hydraulic works, and not inconsistent with a like reasonable use by the other proprietors of land on the same stream above and below.'" In a head-note to that case, stating its pith, the true principle was condensed into the following aphorism: "Every riparian proprietor has an equal right to have the stream flow through his lands in

its natural state, without material diminution in quantity, or alteration in quality; but with the limitation, <sup>250</sup> now well recognized, that each is entitled to the reasonable use of the water for domestic, agricultural, or manufacturing purposes." In *Levis v. Stein*, 16 Ala. 214, 50 Am. Dec. 177, it was decided that, "One invested by grant from the government with title to land, through which a watercourse runs, acquires thereby no greater right to the use of the water than others over whose premises the same stream passes, and cannot so use it as to corrupt or impair its quality to their prejudice or injury."

In *Merrifield v. Lombard*, 13 Allen, 16, 90 Am. Dec. 172, is this language: "Any diversion or obstruction of the water which substantially diminishes the volume of the stream, so that it does not flow *ut currere solebat*, or which defiles and corrupts it to such a degree as essentially to impair its purity and prevent the use of it for any of the reasonable and proper purposes to which running water is usually applied, such as irrigation, the propulsion of machinery, or consumption for domestic use, is an infringement of the right of other owners of land through which a watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy." So in *Dwight Printing Co. v. City of Boston*, 122 Mass. 583, it was said, "A riparian owner has no right, in the absence of express grant or prescription, to pollute the waters of a stream and make it unfit for drinking purposes": See, also, *McGenness v. Adriatic Mills*, 116 Mass. 177.

In *Holsman v. Boiling Spring Bleaching Co.*, 14 N. J. Eq. 335, the principle is thus stated: "Every owner of land through which a stream of water flows is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course, without obstruction, diversion, or corruption. The right extends to the quality as well as to the quantity of the water."

In *Hodgkinson v. Ennor*, 4 Best & S. 229, one occupying an elevation had erected works for the purpose of extracting lead from the soil. From the operation of these works, polluted water was discharged into certain rents in the rocks of the hills which had an underground passage for water communicating with an outlet, at which the water escaped in an open stream at their foot. From these works polluted water flowed, and reached the lands of plaintiff, whereby the water was fouled. It was held that an action for fouling the stream

was maintainable: See, also, *Lincoln v. Taunton Copper Mfg. Co.*, 9 Allen, 181; *City of Orlando v. Pragg*, 31 Fla. 111; 34 Am. St. Rep. 17.

In Gould on Waters it is declared that actions may be maintained for the following causes: "The casting upon one's ~~see~~ own land of dirt and foul water, or substances which reach the stream by percolation; . . . the letting off of water made noxious by precipitation of minerals; . . . or rendering the water unfit for domestic, culinary, or mining purposes; or for cattle to drink of, or fish to live in; or for manufacturing purposes": See, also, *Clifton Iron Co. v. Dye*, 87 Ala. 468; Angell on Watercourses, sec. 136; Addison on Torts, sec. 218; *Carhart v. Auburn Gas Light Co.*, 22 Barb. 297.

It is proper, perhaps, to state a slight modification of the severest interpretation of the language copied above. The same author, in section 220, says: "The natural right of one proprietor to have the stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors, whose fertilization, cultivation, or occupation of their own lands, and whose use of the stream for mill and manufacturing purposes, for irrigation and domestic purposes, will tend to make the water more or less impure, especially when the population becomes dense. So it is of public importance that the proprietors of useful manufactories should be held responsible only for appreciable injury caused by their works and not for slight inconveniences or occasional annoyances, or even some degree of interference with irrigation or agriculture." We approve the following principle extracted from *Sanderson v. Pennsylvania Coal Co.*, 86 Pa. St. 401, 47 Am. Rep. 711: "The exigencies of the great industrial interests must be kept standing in view; the property of large and useful interests should not be hampered or hindered for frivolous or trifling causes. For slight inconveniences or occasional annoyances they ought not to be held responsible, and, in dealing with such complaints, juries should be held with a steady hand."

It is certainly true that, owing to the wants, if not the necessities, of the present age—of agriculture, of manufactures, of commerce, of invention, and of the arts and sciences—some changes must be tolerated in the channels in which water naturally flows, and in its adaptation to beneficial uses. Reasonable diminution of its quantity in gratifying



and meeting customary wants has always been permitted, so, its temporary detention for manufacturing purposes, followed by its release in increased volume, is a necessary consequence of its utilization as a propelling force. Nor must we shut our eyes to the tendency—the inevitable tendency of these and other uses, in which water is an indispensable element, to detract somewhat from its normal purity. These modifications of individual right must be submitted to, in order that the greater good of the public <sup>261</sup> be conserved and promoted. But there is a limit to this duty to yield, to this claim and right to expect and demand. The watercourse must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted, as practically to destroy, or greatly impair its value to the lower riparian proprietor. *Sic utere tuo* in such conditions is enjoined by social obligation and by law. It is difficult, if not impossible, to declare a rule in language so clear and precise, as that it can be applied with certainty to every case that may arise: See *Mississippi Mills Co. v. Smith*, 69 Miss. 299; 30 Am. St. Rep. 546.

A great many questions were reserved during the introduction of the testimony on the trial of this case. So exceptions were reserved to charges given and refused. Very many of these rulings are free from error. We will refer specially to only a few of the exceptions.

There was certainly no error in the rulings on demurrer of which appellant can complain. Under the principles we have declared above, the complaint sets forth a good cause of action, and the fifth plea is insufficient in its averments. The circuit court did not err in sustaining the demurrer to the fifth plea.

Witness Ray was asked by defendant if there were any other ore-washers up there. The obvious meaning and purpose of this inquiry were to prove that some other ore-washer on the stream above plaintiff's land had contributed to the pollution of the stream. The court, on plaintiff's motion, refused to let this question be answered, and the defendant excepted. In this the circuit court erred. If another, not acting conjointly with defendant in doing the act which produced the alleged adulteration of the water, contributed materially to the result and the injury charged, it is not consistent with law or justice that the defendant should be required to answer in damages for that part of the injury it

did not inflict. A different rule would probably prevail if the tort charged was the joint act of two or more; for torts are joint and several, when perpetrated by one act, or with one instrumentality. The question asked indicates that, if there was another contributing cause of the alleged pollution of the water, it was independent of, and separate from, the ore-washer erected and owned by the defendant. It is sufficient for each offender, if acting separately, to be mulcted for its own wrong.

In the general charge, and in the written charge given at the request of plaintiff, the court instructed the jury that the burden of proof was on the defendant—The Tennessee <sup>262</sup> Coal, Iron & Railroad Company—to show that its use of the creek was reasonable. The defendant, in some of its pleas, had denied all the allegations of the complaint. This cast on plaintiff the burden of proving substantially all the averments of her complaint. If these charges had been preceded by an appropriate inquiry, such as, "If the jury found from the evidence that the defendant's washer polluted the water of the stream which flowed on plaintiff's land," or other inquiry of damage which the testimony of plaintiff's witnesses tends to show she suffered, then these charges would be free from error. The charges contain no such expression, but simply assert the naked proposition that the burden of proof was on the defendant.

In certain conceivable conditions these charges would be harmless, but, given as they were, they cannot be vindicated as general propositions of law. In the absence of proof the law imputes blame to no one, but requires of him who makes the charge to establish it by testimony. But we must not be misunderstood. There are categories a person may be placed in, in which the law or public policy throws the burden of exculpation on the defendant. And sometimes the state of the pleadings has that effect. But this case does not appear to be brought within either of those exceptional rules. The circuit court erred in giving each of these charges.

Most of the charges asked by defendant are incompatible with the principles we have declared as governing this case, and need not be noticed in detail. Not one of them in its entirety is a correct exposition of the law as applicable to the facts of this case. Market value and rental value, whether increased or diminished, are not the sole criteria of damage done to an actual occupant of landed interests. It may not

be desirable to sell or let to rent. Profit and comfort of occupation may be taken into the account. The law confers no authority even to enhance the market or rental value of another's freehold, by unauthorized interference with his possession. Whether such unsanctioned interference enhances or diminishes value are inquiries which may enter into the computation of damages, but they are no test of the right to maintain an action for the tort committed.

Considering the testimony in this case, we think the verdict of the jury was excessive. We cannot perceive that permanent injury to the land has resulted, or will result from what has taken place in running the ore-washer. The testimony is that its use has been discontinued, and <sup>203</sup> that the deposit it had caused is washing out. Unless it should be again put in operation the probability is almost a certainty that the debris will be entirely removed. This reduces plaintiff's right of recovery substantially to the amount of injury she suffered while the ore-washer was being operated. Should it again be put in operation, and should its effect be unauthorized under the principles we have declared, she will be clothed with another right of action for the redress of the wrong. The pollution of the water having ceased by a discontinuance of the use of the washer, it would seem the measure of her recovery should be gauged by the injury she suffered in the actual pollution of the water while it lasted, and in the boggy deposit in the creek, until its injurious effects were, or shall become, relieved by the washing of the creek.

Reversed and remanded. \_\_\_\_\_

**WATERS—OWNERSHIP.**—The water of every natural stream in Colorado is the property of the public. Private ownership is not recognized, but the right to divert water therefrom and apply it to beneficial uses is expressly guaranteed by the constitution: *Fort Morgan Land etc. Co. v. South Platte Duch Co.*, 18 Col. 1; 36 Am. St. Rep. 259, and note.

**WATERS—RIPARIAN OWNER'S RIGHTS IN USE OF.**—Every man has the right to the natural use and enjoyment of his own property, and of a natural watercourse thereon, and if, while lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbor below it is *damnum absque injuria*: *Barnard v. Sherley*, 135 Ind. 547; 41 Am. St. Rep. 454. Every riparian owner has the right to use the water of a stream passing over his land for ordinary domestic purposes, even to the extent of consuming all the water of the stream, but, if he materially diminishes its quantity by diversion for manufacturing or other purposes, having no necessary relation to the use of his land, he is liable to

respond in damages to the lower proprietor: *Clark v. Pennsylvania R. R. Co.*, 145 Pa. St. 438; 27 Am. St. Rep. 710, and note, with the cases collected.

**WATERS—POLLUTION—DEPOSITING MINING DEBRIS IN—DAMAGES.**—The owner of coal lands may mine and remove his coal in a proper manner, and if the drainage from his mines falls into and pollutes a stream of water and injuriously affects lower riparian owners, this fact alone will not impose liability on the owners of the coal: *Euler v. Lykens Valley Coal Co.*, 157 Pa. St. 490; 37 Am. St. Rep. 742, and note. See, also, the extended note to *Mississippi Mills Co. v. Smith*, 30 Am. St. Rep. 551.

## WOOD v. HOLLY MANUFACTURING COMPANY.

[100 ALABAMA, 226.]

**MORTGAGE EQUITABLE—LIEN FOR PURCHASE MONEY OF MACHINERY.**—A contract between the owners of a tract of land who have agreed to furnish a water company with a system of water-works, and a manufacturer of pumps and machinery, giving the latter a lien upon the machinery until fully paid for is valid, and such lien is enforceable against such water company or other assignee of such contractors or of such company who purchased the land, although the pumps and machinery are permanently attached thereto, if it appears that their annexation was by the agreement conditional and dependent upon a successful test.

**MORTGAGE EQUITABLE.—LIEN CREATED BY CONTRACT,** and not sufficient as a legal mortgage is generally regarded as in the nature of an equitable mortgage. The form of the contract is immaterial provided the intent to create a security appears.

**EQUITABLE MORTGAGE OR LIEN** in the nature of a mortgage is enforceable in equity only.

**FIXTURES.—ONE OF THE REQUISITES** to convert a chattel into a part of the realty is the intention of the party making the annexation, to make a permanent accession to the freehold. This is implied, if he erects such structures as ordinarily attach to the land without agreement to the contrary with the owner.

**FIXTURES.—THE RESERVATION BY AGREEMENT OF THE RIGHT TO REMOVE** machinery or other erections, which in their removal do not materially injure the premises, prevents them from becoming fixtures.

**SALES—LIEN FOR PURCHASE PRICE.**—If a lien is given in writing upon several articles of personalty sold until the whole amount of the purchase price thereof is paid the payment of the price of one of the articles does not discharge it from the lien for the aggregate price of all of such articles.

**MORTGAGE EQUITABLE.—LIEN FOR PURCHASE PRICE.**—It constitutes no objection to the enforcement of a lien for the purchase price in favor of the vendor of machinery constituting an equitable lien thereon, that such machinery forms a part of water-works intended for a public supply, and that great public inconvenience will be occasioned by the removal of the machinery.

**EVIDENCE—PRESUMPTION.**—A material fact capable of proof but not proved is presumed not to exist.

**FIXTURES—LIEN FOR PURCHASE PRICE OF MACHINERY AS AGAINST PURCHASER OF LAND.**—Parties claiming machinery attached as fixtures to land, as against a lien in favor of the vendor thereof, on the ground that they are *bona fide* purchasers of the land must show that they are such purchasers without notice in respect to the land which is claimed by them under a mortgage, as well as to the bonds which such mortgage was made to secure.

**MORTGAGES—AFTER-ACQUIRED PROPERTY.**—A mortgage covering after-acquired property is not inferior to a lien expressly reserved by the vendor on the property for its purchase price.

**QUITCLAIM DEED — BONA FIDE PURCHASER.** — One holding under a quitclaim deed is not a *bona fide* purchaser without notice.

**SALES—EQUITABLE LIEN FOR PURCHASE PRICE OF MACHINERY.**—The lien of a vendor of machinery reserved by the contract of sale upon all of the machinery placed upon certain land cannot be affected by the fact that a portion of the machinery was placed upon the land after it was conveyed to a third party who acquired only such rights as the original owner had.

**ACTION to enforce an equitable lien for the purchase price of machinery.** On December 13, 1886, the Bienville Water Supply Company entered into a contract with Bullock & Co., by which the latter undertook to construct for the former a system of water-works, including the furnishing of engines and pumps, and take in payment therefor bonds and shares of stock in such water company. Bullock & Co. purchased a tract of land as a site for the water-works, took possession, and erected thereon an engine and pump house, in which they placed the engines and pumps for said water-works. Said water company, in order to carry out its contract with Bullock & Co., made and delivered on January 1, 1887, to the Farmers' Loan and Trust Company of New York, a mortgage on all of its property then owned or which might thereafter be acquired, in trust, to secure bonds to be issued by said water company for the purposes specified, in the sum of seven hundred and fifty thousand dollars, and thereupon executed its bonds amounting to said sum in the aggregate, which it delivered, together with certificates for the full amount of its capital stock, in the sum of five hundred thousand dollars par value, to Bullock & Co. to proceed with and complete said water-works, and to be as full payment therefor when completed. Said mortgage was duly recorded, and the Loan and Trust company accepted the trust. On February 24, 1887, Bullock & Co., in compliance with their contract with the water company, and while yet the owners of the legal title to the land purchased by them as a site for the water-works, entered into a contract with

the Holly Manufacturing Company by which the latter agreed to set up in working order in such engine and pump house, two pump-engines, and connections, to be paid for by Bullock & Co. in installments, as specified in such contract. The Holly Manufacturing Company retained a contract lien on such engines and connections and the possession thereof until the purchase price thereof was fully paid. The Holly Manufacturing Company, in compliance with its contract, completed the erection of one of said engines and its connections prior to March 21, 1888, and had commenced to erect the second engine prior to that date and completed its erection about April 15, 1888. Each of such engines with pumps and connections was placed upon a foundation prepared for it, fastened thereto by tops and bolts, and could be removed without injury to the foundation or to the building in which they were placed. On March 21, 1888, Bullock & Co. executed to the water company a quitclaim deed to the land purchased for a watersite on which the engine-house was situated. Prior to 1888 Hooper & Co. advanced to Bullock & Co. sums of money aggregating one million dollars, to enable the latter to carry on the construction of said water-works, and took as security for the money advanced the bonds and stocks of the water company. Afterward, on learning that the money so advanced was not sufficient to complete said water-works, they declined to make any further advances. Prior to this time Wood & Co. had furnished Bullock & Co. with large quantities of iron pipe and other material to be used in the construction of said water-works, and were under contract to deliver other large quantities of like material. In view of the fact that Hooper & Co. had declined to make any further advances and to obtain payment for the material furnished and which might be thereafter furnished, Wood & Co., Hooper & Co., and Bullock & Co. entered into a written agreement mentioned in the opinion as the "tripartite agreement." The other essential facts are stated in the opinion, except that the relief sought is an account to ascertain the amount due from Bullock & Co. on account of the purchase price of said engines and connections and a sale and removal thereof for the satisfaction of the amount so ascertained. A demurrer to the complaint was overruled and an appeal taken from such ruling.

*Overall & Bester and T. A. Hamilton, for the appellants.*

*R. H. Clarke, for the appellee.*

<sup>245</sup> **HARALSON, J.** 1. In the opinion of the chancellor, (Coleman) it was very pertinently asked, "Were complainants and Samuel R. Bullock authorized to make the contract of which exhibit A is a copy, was it a legal contract, and did it give complainants a lien upon the engines and connections as a security for the payment of the whole debt secured?" Answering, it was said, "There can be no question of this. They were the absolute owners of the property, the subject of contract, were under no disabilities to make it, and were authorized and capable of making such terms and provisions as they saw proper. If this suit was between complainants and Bullock & Co. only there would be no room for controversy. Can Samuel R. Bullock & Co., by any voluntary act on their part, amend and destroy the security thus given without the consent of the other party, or without some fault or negligence of the other?"

Let us treat the case for the time, therefore, as if it were between complainant and Bullock & Co. only, and the rights of intervening third parties become of easier solution.

2. The contract expressly reserved a lien on the engine, pumps, and connections, with the privilege of possession. The character of this lien has been the subject of much discussion, and is well settled in the books. There is but a narrow distinction so far as the security of the debt and its enforcement in a court of equity goes between a mortgage, as such, and what is denominated simply an equitable lien or mortgage. A lien, to be of the former class, must arise where the possession remains with the debtor. It is some <sup>246</sup> thing more than a mere lien or security. As said by this court in *Jackson v. Rutherford*, 73 Ala. 157, "No technical words are necessary to constitute a mortgage which would be good at law any more than in equity. Any words would be sufficient which serve to show a transfer of the mortgaged property as security for a debt. Whatever language may be used, if it shows that the parties intended a sale of the chattels as security, the instrument will be construed to be a mortgage": Jones on Chattel Mortgages, secs. 1, 8, 9. The court adds, "In some of our decisions expressions are used which seem to confound the distinction between legal and equitable mortgages, but there is no case in our reports

which really conflicts with the principles declared in this decision."

Again, it was said in *Kyle v. Bellenger*, 79 Ala. 516, 521, that "A lien created by contract, and not sufficient as a legal mortgage, will generally be regarded as in the nature of an equitable mortgage. The form of the contract is immaterial. Though a lien may not be expressed in terms, equity will imply a security from the nature of the transaction, and give it effect as such, in furtherance of the agreement of the parties, if there appears an intention to create a security. Says Judge Story, "If the transaction resolves itself into a security, whatever may be its form, it is in equity a mortgage." Neither is any particular form of words necessary to the reservation of a lien. Any words which manifest an intention to retain one will be sufficient in a court of equity."

An equitable mortgage, or lien in the nature of a mortgage, is enforceable alone in equity, and a legal mortgage, at law or in equity: *Newlin v. McAfee*, 64 Ala. 357; *Jones v. Anderson*, 76 Ala. 427, 431; *Alabama State Bank v. Barnes*, 82 Ala. 607, 620; *Donald v. Hewett*, 33 Ala. 534; 73 Am. Dec. 431; 3 Pomeroy's Equity Jurisprudence, secs. 1233-1237; *Gregory v. Morris*, 96 U. S. 619.

It has been suggested in argument against the idea of a retention of a lien of any character by the complainant which could be made effective as a security, that the engines, pumps, and their connections became fixtures to the freehold and incorporated into the system of the water company, and could not be removed; but the bill alleges and the proofs show that the annexation of the chattels to the realty were, by the agreement, conditional. It was not intended on either side that they should become permanent accessions to the land—converted into a part of it—until two conditions were complied with, viz., 1. That the engines, after being attached as they were, should be subjected to a thirty day test to ascertain if they came up to the guarantee <sup>247</sup> of their builders, which they were required to do before, Bullock & Co. were bound to accept them; and 2. Not before they were paid for if they were found to be satisfactory. If they had proved to be failures they would have had to be removed; and so, if not paid for, they might also, according to the agreement, be removed, if necessary in the enforcement of the lien reserved for their purchase price; otherwise, the contract of the parties would be rendered nugatory.



One of the requisites to convert a chattel into a part of the realty is that it must be the intention of the party making the annexation, to make a permanent accession to the freehold, which will be implied, if he erects such structures as ordinarily attach to the land, without agreement to the contrary with the owner. But, reservation of the right by agreement of the parties is sufficient to remove a house, or machinery or other like erections, which, in their removal, do not materially injure the premises: *Harris v. Powers*, 57 Ala. 139, 143; *Tillman v. De Lacy*, 80 Ala. 103; *Vann v. Lunsford*, 91 Ala. 576; *Ware v. Hamilton-Brown Shoe Co.*, 92 Ala. 145, 151; *Ewell on Fixtures*, secs. 66, 316.

4. It has been made to appear, therefore, that, so far as complainant and Bullock & Co. are concerned, there was no legal impediment in the way of their entering into a contract; that there was nothing in the condition of the property and the character of the lien reserved which forbade them to contract as they did, and that, whether, as a matter of fact, the possession of the property was retained by complainant or delivered to Bullock & Co. makes no difference in the security, since a court of equity will enforce it in the one case as well as in the other, unless the security has been forfeited by transactions outside of the conditions in the original contract, which defendants contend has been done as to Bullock & Co. on two grounds, which we consider.

5. It is contended that pump No. 1 was fully paid for before the filing of the bill, and was, therefore, relieved of complainant's lien; and that the pumps are necessary for public purposes, and cannot be removed without stopping public works.

It is not denied that twenty-five thousand dollars of the fifty thousand dollars agreed to be paid for both engines has been paid; that, as the money was paid in installments, as it was agreed it should be paid, it went in payment of the first work done, and as done, which was on pump 1, and that the sums so paid were in full of the cost price of that pump. But, while this is clear, yet not a word appears to have been said, when any or all the payments were made, that they should operate as a release <sup>348</sup> of the lien on that pump, for the price of the two; and the contract does not provide for a lien on each pump, separately, for its own price, and not for the price of both; but it is, on the other hand, expressly stipulated, "that the party of the second part (complainant)

shall have a lien on all of said engines and connections, . . . until the whole amount of the purchase price of said engines and connections have been fully paid." The lien was upon the whole, and not upon a part only, and no part of the security has been released. The construction contended for would go to the extent of holding that where a lien is given in writing on several articles sold, to secure the aggregate price of all, it operates only as a lien upon each article sold for its own price, which we are unable to sanction.

6. The second point mentioned, that of the forfeiture or loss of the lien on account of the public inconvenience, is equally untenable. Public policy favors the enforcement of debts and the sustaining of credit, public as well as private. Water-works, railroads, gas-works, and other like enterprises, in which the public are so largely interested, are constructed mainly upon credit, which could not be obtained if a lien or mortgage given to secure the credit were denied enforcement by the courts, because the public would be inconvenienced by its assertion. Such a doctrine would be tantamount to the appropriation of private property to public use without compensation, which is forbidden by the constitution. If the principle were tenable, it would apply with as much force to the general mortgage given by the water company to secure its bonds, under which some of these defendants are claiming as against the complainant's lien, for its foreclosure might work all the public inconvenience that the enforcement of complainant's lien could possibly do: *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 214; Phillips on Mechanics' Liens, sec. 182.

7. From what has gone before, we may the better inquire and understand what rights third parties might have acquired the nature of such rights, and their effect upon complainant's lien.

From the statement of facts it has appeared that the water company is the principal debtor on the bonds, and is the mortgagor of the real estate to which the engines are said to be attached as fixtures. Hooper & Co., who, as agents, advanced the money for Bullock, and who are his successors, and Wood & Co. are holders of the bonds, the security of which will be diminished by the enforcement of complainant's lien.

249 The other defenses set up for these parties as stated and argued by their counsel are: 1. That the lien of com-

plainant is void as to each of them, because not recorded; 2. That Hooper & Co., as successors of Bullock, are *bona fide* purchasers without notice; 3. That Bullock & Co. were fully paid by the water company; 4. That complainant did not retain possession of the pumps, and the bondholders had no notice of complainant's lien; and 5. That the second pump was erected after Bullock & Co. had conveyed to the water company the land to which it was attached.

The real defense, which, if good, complainant must fail in the litigation, and if not, these defendants must fail is that they are *bona fide* purchasers without notice.

8. So far as the water company may be protected by such a plea, it is scarcely worth the while to discuss. It does not deny complainant's lien, and its notice of it. It simply does not admit the lien and notice; but, its attitude is that of a defendant in the interest of Hooper & Co., and Wood & Co. For them, it denied the said lien and notice of it, and claims in argument, that they are *bona fide* purchasers without notice. The water company was driven by force of the facts to, and very honestly assumed, this attitude in the litigation.

9. With respect to this transaction the distinction between Bullock & Co. and the water company is purely formal and fictitious. Bullock & Co. were the water company in every thing but name. They held the entire capital stock. The entire issue of bonds under the general mortgage was placed at their disposal. Without neglect of duty, the company must be presumed to have known what Bullock & Co. were doing toward the fulfillment of their contract. The proofs tend strongly to show, that the president, Dr. Ketchum, who resided then and afterward in Mobile, had knowledge of complainant's lien and of its retention of the possession of the property before Bullock & Co. conveyed to the company the land on which the engines are located, and his deposition was not taken to rebut proof of notice, for the reason, we may presume, he could not rebut it. A fact important to be proved for the defense, capable of proof, and not proved, will be presumed not to exist: *Roney v. Moss*, 74 Ala. 390; *Carter v. Chambers*, 79 Ala. 231.

10. As to the other defendants, for whom the plea is set up, two essentials are necessary to be borne in mind for the establishment of their claim: 1. That the pumping-engines had become fixtures of the real estate covered by the mortgage of the water company; and 2. That these defendants

are *bona fide* purchasers of said real estate, for value, without notice.

The complainant sets up no equity against all, but against a part only, of the property claimed to be covered by the mortgage made to secure the bonds. This litigation does not raise the question of protection of the bonds. These might well be entitled to protection against secret trusts if any were sought to be fastened on them, but not to equities attached to the land, conveyed to secure them. If defendants claim the land as subject to their mortgage, by virtue of their being *bona fide* purchasers of it, for value, without notice of complainant's lien on it, which was prior to theirs, then, by their plea or answer, it was incumbent on them to make such claim as to the land itself, in the manner required by law. The defendants did make known their claim to the bonds, and how they acquired them, but whether in a manner as full as it is required by law (*Thames v. Rembert*, 63 Ala. 561, 572), we do not find it necessary to decide; still, if sufficient as to the bonds, the answers are silent as to the material facts necessary to uphold the claim of *bona fide* purchasers of the land, on which it is claimed the engines were attached, in a manner to make them immovable fixtures. "The rule is settled in this state, that in such cases (defense of *bona fide* purchase) it is required of a defendant, who is a subpurchaser, to aver in his plea or answer, clearly, distinctly, and without equivocation, and with proper circumstantiality of detail, the following facts: 1. That he is a purchaser from one in actual or constructive possession, who was seised or claimed to be seised of the legal title, at the same time briefly setting out substantially the contents of the deed of purchase, with date, consideration, and parties; 2. That he purchased in good faith; 3. That he parted with value paying money or other valuable thing, assuming a liability, or incurring an injury, stating the nature of the consideration fully; 4. That he had no notice of complainant's equity, and knew of no fact calculated to put him on inquiry, either at the time of the purchase, or at or before the time he parted with the consideration": *Hooper v. Strahan*, 71 Ala. 75, 79; *May v. Wilkinson*, 76 Ala. 543, 545; *Gresham v. Ware* 79 Ala. 192; *Boone v. Chiles*, 10 Pet. 211. In the last case cited the supreme court of the United States, in announcing a similar doctrine, say, that the conveyance must be a regular one; "for the purchaser of an equitable title holds it

subject to the equities upon it in the hands of the vendor." And our court, in *Gresham v. Ware*, 79 Ala. 194, speaking of the same defense, <sup>351</sup> and announcing the same doctrine as that stated above from *Hooper v. Strahan*, 71 Ala. 75, say of the party setting it up, "In no appropriate manner does he bring before the court the claim of a *bona fide* purchaser without notice, and his rights as such must be considered as eliminated from the case."

11. When the general mortgage was made the water company had not acquired and did not own the legal title to the land to which the engines are attached. The claim of defendants rests on the extension of the mortgage, to "after-acquired property." Such a mortgage does not pass the legal title to after-acquired property; it is only an equitable mortgage, operative on such property as soon as it is acquired. "In other words it seizes the property or operates on it by way of estoppel, as soon as it comes into existence and is in the possession of the mortgagor": 1 Jones on Mortgages, sec. 152.

12. To the proposition that a prior general mortgage, which in terms covered after-acquired property, attached to rolling stock as soon as acquired, to the displacement of a contractual lien on it, the supreme court of the United States, by Justice Bradley, said, "The doctrine is intended to subserve the purposes of justice and not injustice. A mortgage intended to cover after-acquired property can only attach itself to such property, in the condition in which it comes to the mortgagor's hands. If that property is already subject to mortgages or other liens the general mortgage does not displace them, though they may be junior to it in point of time": *United States v. New Orleans R. R. Co.*, 12 Wall. 362. And it was added, that such a prior lien or equity does not come within the reason of the registry laws, which are intended for the protection of subsequent, not prior, purchasers and creditors. This court, touching the same matter, in *Shorter v. Frazer*, 64 Ala. 81, quotes approvingly the language of C. J. Marshall in *Vattier v. Hinde*, 7 Pet. 271, that, "The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate, and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. Even the purchaser of an equity is bound to take notice of any prior equity." And in the same case the court

hold, that, if the purchase is of a mere equity, which can be enforced only through the instrumentality of a court of equity, there is no reason for a departure from the general principle, that priority in point of time creates priority in point of right, and that the <sup>352</sup> transfer or conveyance must be limited to the interest of the grantor: 2 Story's Equity Jurisprudence, sec. 1228; 1 Jones on Mortgages, sec. 158; *Fosdick v. Schall*, 99 U. S. 235; *Myer v. Car Co.*, 102 U. S. 1; *Central Trust Co. v. Kneeland*, 138 U. S. 414, 423.

The chancellor, in his opinion in this case, used language so apt in this connection, we quote it here: "If the principle contended for by respondents be law it is unsafe to contract with anybody for improvements, and rely upon the improvements for a contract lien as security. The landowner, whose property is being improved, has only to wait until the improvements are nearly completed, and sell out to some one who has given a "walking mortgage," and the unsuspecting party will find himself stripped of his property and security."

These defendants when they acquired the bonds parted with the valuable consideration which they here set up as a defense. If at that time their vendor, the water company, had no legal title, they acquired nothing more than the title their vendor afterward acquired, subject to existing equities.

13. The deed from Bullock & Co. to the water company was a quitclaim deed. It passed only such interest as Bullock & Co. had, subject to all liens and encumbrances. As has been repeatedly held, one who holds under a quitclaim deed only cannot claim protection as a *bona fide* purchaser without notice: *Derrick v. Brown*, 66 Ala. 162; *Smith v. Perry*, 56 Ala. 266-269; *McMillan v. Rushing*, 80 Ala. 402, 407.

14. As to whether or not defendants Hooper & Co. and Wood & Co. had notice of complainants' lien, as a matter of fact, is scarcely open to discussion. As to when they acquired notice is the subject of dispute, and the evidence is somewhat conflicting. Those firms, however, from the very beginning, stood in close and very important business relations to Bullock & Co., as respects the building of the water company's works, and it was the natural and businesslike thing to do, for them to have become fully informed in regard to all of Bullock & Co's arrangements for carrying out their contract with the water company.

In June, 1887, an agreement was entered into between Hooper & Co. and Bullock & Co., in reference to the furnish-

ing of moneys for the completion of the water-works at Mobile, in specifying, among other things, that said Hooper & Co., having already procured advances to Bullock & Co. of fifty per cent of the seven hundred and fifty thousand dollars agreed to make other advances to them on the completion of said works and their acceptance by the city, "clear of all liens or encumbrances other than the <sup>253</sup> first mortgage under which the bonds on which these advances are made and to be made."

On the 2d of October, 1887, for considerations therein expressed, Bullock & Co. agreed to give to Walter Wood, of the firm of Wood & Co., a controlling interest in the construction of the water-works company, after the moneys for which the bonds specifically placed with Hooper & Co. and Wood & Co., together with such expenditures as were necessary to pay for the labor required and to furnish the supplies, materials, and machinery for the completion of the works, should be paid.

Said Walter Wood testified that the firm of Wood & Co. were informed in August, 1887, that complainant was to furnish the engines and pumps to Bullock & Co., and Harry S. Hooper testified that Hooper & Co. were so informed in September, 1887, and in that month they show that Bullock & Co. furnished them each with a detailed statement of the estimated cost of the works, in which was included an item of fifty thousand dollars for "pumping-engines to the Holly Manufacturing Co."

By the third item of the "tripartite agreement" (between Hooper & Co., Wood & Co., and Bullock & Co.), dated 26th of October, 1887, Wood & Co. agreed to complete the works therein mentioned, "according to specifications clear of all liens ahead of the securities held by Hooper & Co. with the utmost diligence and without delay."

Bullock testified that advances were made to his firm, after that agreement was entered into, by Hooper & Co. to the extent of two hundred thousand dollars, and by Wood & Co. for at least one hundred thousand dollars. He also testified that he furnished to Hooper & Co., between August and October, 1887, all the papers relating to the various plants in which his firm was concerned, including that at Mobile, and turned them over to them; and prior to October 26, 1887, the date of the tripartite agreement, he called Walter Wood's attention to his contract with complainant, and gave him a copy of it.

After all this what doubt can remain that these defendants

were fully informed and had notice of complainants' lien on the engines and pumps long before the land on which they were erected was conveyed to Bullock & Co. by quitclaim to the water company?

15. There is much evidence, also, tending strongly to show that complainant, by its agents, was in the open and notorious possession of the property from the beginning up to the time of the filing of the bill. This evidence, however, was in conflict with much introduced by the defendants <sup>354</sup> tending to show to the contrary. We will not review it, since it is unnecessary.

16. As to the defense set up that the second pump was erected after the conveyance by Bullock & Co. to the water company, it is sufficient to say that the first engine and its connections had been placed on the land before the conveyance, and the placing of the second had been commenced, was then going on, and was soon thereafter completed, and that the fact that some of the parts of the second engine were attached after the conveyance cannot affect the question of complainants' security, which was reserved upon the whole, and not upon a part, of the property. The complainant had, as against Bullock & Co., under their contract with them, an equity to proceed with the completion of their contract, which was to put both engines on the ground ready for use, and this equity a court of chancery recognizes. The water company and its mortgagees, as we have shown, acquired only such rights in the land as Bullock & Co. had, subject to all equities with which it was burdened, including this one of the complainants, to complete its contract. In contemplation of law, the complainants' rights and equities as to both engines and their connections are the same as if both had been put in place before the date of said conveyance.

17. Still another defense is interposed that Bullock & Co. had been fully paid by the water company all that it contracted to pay them, and, if they did not pay complainant, the bondholders ought not to be held to lose a part of their property covered by their mortgages, concerning which it need only be said that they had no mortgage which was prior to complainants' lien, and if by their carelessness they failed to see that this lien, of which there is every reason to believe they were informed, was not paid off so as to allow their mortgage to become operative on the machinery in question, it would be inequitable and against all good conscience to re-



quire complainant to surrender their prior lien on it for the benefit of defendants.

18. We deem it unnecessary to notice any other questions raised, or the objections to evidence with which the case is burdened, because on the legal evidence in the cause the complainant is entitled to recover.

The demurrer to the bill was properly overruled, and it is our judgment that the decree of the chancery court be affirmed.

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**MORTGAGES—EQUITABLE—HOW CREATED.**—A mortgage defectively executed, or an imperfect attempt to create a mortgage upon specific property, for the purpose of securing a debt, will create a specific lien upon the property intended to be mortgaged: *Peers v. McLaughlin*, 88 Cal. 294; 22 Am. St. Rep. 306, and note. A conveyance, assignment, or other instrument transferring an estate is considered in equity a mortgage if originally intended as security for the payment of money, whether such intention appears from the instrument or not: *Campbell v. Roddy*, 44 N. J. Eq. 244; 6 Am. St. Rep. 839. See the monographic note to *Hutsler v. Phillips*, 4 Am. St. Rep. 696-708, for a thorough discussion of this subject.

**FIXTURES—INTENT.**—The chief test by which to determine whether an article is a fixture is to inquire whether the party annexing it intended it to be a permanent accession to the freehold: *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163; 39 Am. St. Rep. 166, and note.

**FIXTURES—EFFECT OF AGREEMENTS AS TO.**—The character of property as real or personal may be fixed by contract with the owner when the article is placed in position, but such contract cannot affect the rights of innocent purchasers: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235, and note; *Tibbets v. Horne*, 65 N. H. 242; 23 Am. St. Rep. 31, and note. See, also, the note to *Fifield v. Farmers' Nat. Bank*, 39 Am. St. Rep. 172.

**QUITCLAIM DEEDS—BONA FIDE PURCHASERS.**—One who buys realty under a quitclaim deed from his immediate grantor is not a *bona fide* purchaser as to outstanding and adverse equities and interests against his grantor shown by the record, or which might have been discovered by reasonable diligence: *Pleasants v. Blodgett*, 39 Neb. 741; 42 Am. St. Rep. 624, and note.

## VANN v. MARBURY.

[100 ALABAMA, 433.]

**NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASER.**—THE HOLDER OF NEGOTIABLE PAPER AS COLLATERAL SECURITY FOR A PRE-EXISTING DEBT is not a *bona fide* holder for value, nor entitled to protection against equities and defenses existing between prior parties, of which he had no notice.

**NEGOTIABLE INSTRUMENTS ASSIGNED BEFORE MATURITY,** unless payable to bearer, or indorsed, are subject in the hands of the assignee, until the debtor is notified of the assignment, to the same equities as would have affected the assignor.

**NEGOTIABLE INSTRUMENTS—FORBEARANCE AS CONSIDERATION FOR TRANSFER OF COLLATERAL.**—The transfer of a mortgage note as collateral security in consideration of indulgence granted on the mortgage debt does not make the transferee a *bona fide* purchaser or holder, unless there is such a clear, definite, and certain agreement as to the terms and time of such forbearance as to constitute an independent consideration for the transfer.

**NEGOTIABLE INSTRUMENTS—EFFECT OF PAYMENT OF MORTGAGE NOTE.**—The payment by the mortgagor to the mortgagee of the mortgage note, either before or after maturity, without notice of its transfer, protects the former, provided the note is non-negotiable, against suit thereon by the transferee, although the note was not produced and delivered at the time it was so paid. The burden of proof is on the transferee to show that the mortgagor had notice of the transfer before the payment was made.

**NEGOTIABLE INSTRUMENTS—NOTICE OF TRANSFER.**—A LETTER CONTAINING NOTICE of the transfer of a note, sent postage prepaid and to the proper office, properly addressed to the maker of the note and never returned, makes only a *prima facie* case of notice, which is overcome by the positive, unequivocal, and unimpeached denial of the maker that he ever received notice of such transfer.

**NEGOTIABLE INSTRUMENTS—TRANSFER.**—NO PRESUMPTION EXISTS that the payee of notes secured by mortgage has transferred them, before acquiring the equity of redemption from the mortgagor. One purchasing from such payee is not chargeable with notice that such notes, although not due, have been assigned unless the mortgage shows upon its face the negotiable character of such notes, in which event it may be incumbent on the purchaser to inquire as to whether they have been assigned.

**NEGOTIABLE INSTRUMENTS—ASSIGNMENT OF MORTGAGE NOTE AS COLLATERAL—PURCHASE OF MORTGAGED PREMISES WITHOUT NOTICE.**—If land is mortgaged to secure the payment of a note, the character of which is not shown by the mortgage, and the mortgagor pays off the mortgage to and procures its cancellation by the mortgagee without notice of the transfer of the note, and without its surrender, and then sells the mortgaged premises to a purchaser in good faith under representations by the mortgagee that he is the owner of the mortgage note which has been temporarily mislaid, an assignee of such note from the mort-

gages without indorsement, and as collateral security for an antecedent debt, cannot subject the land to the payment of such note. Under such circumstances the fact that the note was not produced and surrendered at the time of its payment does not put the mortgagor or purchaser on inquiry so as to lead to the notice of such assignment.

*Lane & White and W. R. Houghton*, for the appellant.

*Ward & John*, for the appellee.

439 STONE, C. J. Many of the assignments of error are based on the objections of appellant to portions of the testimony offered by appellee. Without ruling specifically on the objections the chancery court rendered a decree on the merits in favor of appellee. We shall consider only the substantial controversy as shown by the record, and, in doing so, will look alone to the legal testimony to determine whether or not it authorizes the decree from which the appeal is taken.

440 The controversy as it comes before us in this record is mainly one of fact, and arises out of the following circumstances: In December, 1886, Vann sold and conveyed a tract of land near Birmingham, Alabama, to Harriett Moore, in consideration of the sum of \$4,000, of which \$1,333.33 was paid cash, and for the balance Mrs. Moore and her husband executed and delivered their two joint notes for \$1,333.33 each, both dated December 27, 1886, payable, respectively, at twelve and twenty-four months from date and secured by a mortgage on the land. The mortgage recites an indebtedness of \$2,666, one-half due December 27, 1887, and the other due December 27, 1888, and was duly recorded. On the first day of June, 1887, Vann transferred the first of said notes to Marbury as collateral security for an antecedent debt owing by the former to the latter.

It is claimed by appellee that notice of this transfer was given by him, Marbury's, attorney to Mrs. Moore, at the time of the transfer, or shortly thereafter, by a letter addressed to her at Birmingham or Avondale (the witness being uncertain which), but stating that the envelope had his name printed thereon, and that the letter was never returned to him.

Afterward, to wit, October 24, 1887, Mrs. Moore, believing she would not be able to meet the notes, and before either of them had matured, sold the property to the Woodlawn Cemetery Company for \$4,158. Of this sum \$358 was paid to

her in cash, and \$3,800 in stock of said company; \$1,000 of the stock she retained, and the remaining \$2,800 of stock was, contemporaneously with its payment to her, transferred by her to Vann. Vann, Mrs. Moore, Erswell, and Nash were present at the conclusion of the trade, the two latter being respectively president and secretary of said Woodlawn Cemetery Company. When the money and stock were paid, Vann agreed to go at once to the courthouse and cancel the mortgage on the records. He also stated that the mortgage and notes were at his office, and requested Mrs. Moore to go with him from Erswell's office to his office where he would deliver the papers to her. Mrs. Moore and Nash both went with Vann to his office, where he got the mortgage and one of the notes (the last note), and gave them up to Mrs. Moore, saying that the other note (the one in controversy) was mislaid and that he would get it for her in a day or two. He gave Mrs. Moore a receipt against the last-mentioned note, in which receipt it is recited that the note was then in the hands of W. C. Ward, but it does not appear that this receipt was shown to Nash or that he knew of this recital <sup>441</sup> therein. Vann afterward made various excuses for not delivering up the note. Mrs. Moore denies ever having received notice of the transfer of the note, and the Woodlawn Cemetery Company also denies notice that appellee held the note or claimed any interest in it, and also of all the facts that might put it on inquiry.

Vann did not in fact cancel the mortgage on the records for some months after the payment; he, on one occasion, told Mrs. Moore that he had done so, but she, finding the statement to be false, required him to go to the records with her and make the proper entry of satisfaction. He is not examined by either party as a witness.

The question argued by counsel as to whether or not the note transferred by Vann to Marbury is negotiable is not a material one for several reasons. In the first place it was transferred to Marbury as collateral security for an antecedent debt Vann owed him. The doctrine in this State is that the holder of negotiable paper as collateral security for a pre-existing debt is not a *bona fide* holder for value, nor entitled to protection against equities and defenses existing between prior parties, of which he had no notice, but that such paper is open in the hands of such holder to all the defenses which could have been made against it while in the

hands of the original owner: *First Nat. Bank v. Johnston*, 97 Ala. 655.

In the next place it nowhere appears from the record that the note was indorsed by Vann to Marbury, so as to carry the legal title. Even negotiable paper assigned before maturity, unless payable to bearer, or indorsed, will be subject in the hands of the assignee, until the debtor is notified of the assignment, to the same equities as would have affected the party from whom it was received. The rule, in such cases, applicable to both non-negotiable and negotiable paper, has been well stated as follows: "When the written evidence of indebtedness is non-negotiable or overdue, indorsement will not obviate the necessity of notice; but, when negotiable paper requiring indorsement is assigned by delivery, notice has been held necessary to perfect the assignment": Wade on Notice, sec. 442.

It is true the testimony tends to show that the transfer of the note as collateral was in consideration of indulgence granted by Marbury to Vann on the debt for the security of which the note was so transferred, but the testimony does not show such a clear, definite, and certain agreement either as to the terms or time of the forbearance, as to constitute an independent consideration for the transfer which would <sup>442</sup> give the transferee the rights of a *bona fide* holder for value without notice. Whether or not, therefore, the note in controversy was or was not negotiable paper, the whole question is one of notice.

Did Mrs. Moore, before or at the time of making payment of the note to Vann, have notice of the transfer of the note to Marbury? And did the Woodlawn Cemetery Company, at the time or before making payment of the purchase money to Mrs. Moore and to Vann, have notice of such transfer or of any fact sufficient to put it on inquiry?

In the absence of notice to Mrs. Moore of the transfer of the note to Marbury the payment made by her to Vann would be a complete protection to her against this suit, notwithstanding the note was not produced and delivered up at the time of such payment.

In *Hart v. Freeman*, 42 Ala. 568, we said: "The maker of a promissory note, not negotiable, may pay the same to the payee after its maturity, even though the note be not produced and delivered up at the time of payment, provided the maker has had no notice of the indorsement or transfer

of the note to a third person. And such payment would be a valid and competent defense against the note, should it afterward appear and suit be brought thereon against the maker by another holder." It was further held in that case that the burden of proof rests upon the plaintiff in the action, the defendant having proved the payment, to show that the defendant had notice of the transfer or indorsement before the payment was made. We cannot perceive that the fact that payment of the note in controversy was made before maturity takes the case without the influence of the decision in *Hart v. Freeman*, 42 Ala. 568.

The testimony in the record shows that both Mrs. Moore, the maker of the note, and the Woodlawn Cemetery Company deny all notice of the transfer of the note by Vann to Marbury. On the other hand, W. C. Ward, attorney for Marbury, testifies that he notified Mrs. Moore of the transfer of the note to Marbury at the time, or shortly after, it was made, by addressing her and her husband a letter through the postoffice at Birmingham or Avondale (the latter according to the best of his recollection), and that the letter was never returned to him, although the envelope in which it was inclosed had his name and address thereon.

If we may take judicial cognizance of the postal regulation or custom to return undelivered letters to sender, when there is a printed or written request to that effect and the address of the sender on the envelope, we cannot consider <sup>443</sup> this testimony as satisfactory or conclusive on the question of notice of the transfer of the note in the face of Mrs. Moore's positive denial of notice, and the further fact that the burden of proof rests upon the complainant to establish notice. In the first place the witness does not state the postage was prepaid on his letter. In the second place it appears from Mrs. Moore's testimony that she, at the time the letter was sent, received her letters from the Birmingham postoffice instead of at Avondale where she resided. In the third place, if it had been stated by Mr. Ward that his letter was sent postage prepaid, and to the proper office, it would simply have made out a *prima facie* case of notice, which is overcome by the positive and unequivocal denial of Mrs. Moore that she ever had notice of such transfer. We discover nothing in the testimony which disentitles her to full credit as a witness, and, in accepting her denial of having received notice, we do not in any wise discredit the testimony of Mr. Ward. The

testimony of the two can be reconciled upon the theory that Mr. Ward's letter went to the postoffice at Avondale, where Mrs. Moore was not accustomed to receive her letters, or that the letter was not prepaid, or was lost in the Birmingham postoffice, or delivered to some person who failed to hand it to her.

Appellee further insists, however, that both Mrs. Moore and the Woodlawn Cemetery Company were either notified of the transfer of the note or acquired knowledge of facts sufficient to put them on inquiry at the time the payment by Mrs. Moore was made and the purchase by the Woodlawn cemetery was concluded; that the receipt itself, given by Vann to Mrs. Moore on that occasion, recited that the note in controversy was then in the hands of W. C. Ward.

A careful review of the testimony fails to satisfy us that this contention is supported by the proof. On the contrary, Mrs. Moore swears: "Vann did not say my note was out when he made the trade, but said so when he delivered my paper. When I delivered the deed to Erswell, Vann did not tell me that the note was out. The note was handed me in Vann's office. I never heard him say any thing in presence of Erswell about the note being out, and nothing in that of Nash except in his office." Nash, in his testimony, shows that the money and stock were paid to Mrs. Moore and the deed delivered by her to Erswell in his office before Mrs. Moore. Nash and Vann went to the latter's office, and we think it appears this was all done on the faith of Vann's statement that the notes and mortgage were in his office. Nash says, "Mr. Erswell, Mr. Vann, Mrs. Moore, and myself were the <sup>444</sup> parties present at Mr. Erswell's office when the payment was made. The notes and mortgage were at Mr. Vann's office, so he said at the time. I went up to Mr. Vann's office with Mrs. Moore when she received one note and the mortgage, I think; she also received a receipt for the other note which he said was then misplaced, but he would surrender it in a day or so. Later on he made various statements as to the note," etc. And again, on cross-examination, he says, "I was present when Mrs. Moore executed the deed to the W. C. Co. Mrs. Moore was paid \$358 cash, and \$3,800 in stock, and she paid Vann \$2,800 stock; the W. C. Co. paid him nothing. After the stock had been transferred to Vann by Mrs. Moore she demanded the notes from Vann, and she went up to Vann's office to get them, but she only received

one and a receipt for the other. He said that note was then misplaced, and promised to deliver it to her in a day or so; am quite sure he did not say it was in Ward's hands or any other person's hands at that time."

Erswell is also examined, and corroborates Nash as to the conclusion of the trade at Erswell's office, and the statement then made by Vann that the notes were at his office, and the fact that Vann, Mrs. Moore, and Nash left Erswell's office to go to Vann's office. We cannot discover from the testimony that Nash read the receipt given by Vann to Mrs. Moore for the note in controversy, or that Nash there learned any fact which would have put him on inquiry, unless it was the one fact that the note here in suit was not actually produced and surrendered.

So far as the Woodlawn Cemetery Company is concerned, it not appearing that the receipt showing that the note was then in Ward's hands was shown to Nash, we think the statements made by Vann, in the hearing of Nash, both at that time and at Erswell's office, that the note was mislaid and would be surrendered in a day or two, disarmed all suspicion on Nash's part that the note had been transferred. Indeed, if inquiry had been excited, of whom would he have made it? He could not have gone out into the community generally to make such inquiry. He could have gone to no one except to the mortgagor and mortgagee, and it is apparent that inquiry of either of them would have been unavailing in the light of the testimony in this record. And, so far as Mrs. Moore is concerned, it may be said that the statements of Vann to her before and accompanying the delivery of the receipt for the note, might justly be said to have disarmed any suspicion which, without such statements, the recital in the receipt that the <sup>445</sup> note was in Ward's hands ought to have excited in her mind: *Brown v. Blydenburgh*, 7 N. Y. 142-146; 57 Am. Dec. 506.

It is to be observed this receipt does not recite that the note had been transferred to Ward, but that it was in his hands. If this recital stood alone it may be it was sufficient to put Mrs. Moore on inquiry, and that she would be chargeable with notice of all facts inquiry from Ward would have elicited; but, in connection with Vann's statements at the time of the payment, and, also, accompanying the delivery of the receipt, the most natural inference Mrs. Moore could have drawn from such recital in the receipt would have been



that the note was in Ward's hands, not as transferee, but as agent for Vann, and that it had been mislaid.

We see no escape from the conclusion that Vann's declarations and conduct were intended, and naturally had the effect, to quiet suspicion and prevent inquiry by Mrs. Moore and the officers of the Woodlawn Cemetery Company, and sufficiently excused their failure to demand the production and surrender of the note: *Brown v. Blydenburgh*, 7 N. Y. 142; 57 Am. Dec. 506; 1 Jones on Mortgages, sec. 791; *Van Keuren v. Corkins*, 6 Thomp. & C. 355.

The question with which we have mainly to deal, in this case, is not whether the mortgage can be enforced as to this note against Mr. and Mrs. Moore, or whether they are liable personally to Marbury on the note, but whether the note is enforceable in this suit as a lien on the land as against the Woodlawn Cemetery Company, the purchaser of the land. Its attorney examined the title and found no encumbrance except the mortgage from Mrs. Moore and her husband to Vann securing the two notes. So far as the record showed, therefore, Vann was the proper party to whom payment of the mortgage debt should be made, and who had the right to cancel the mortgage. In *Ogle v. Turpin*, 102 Ill. 148, it is said: "There is no presumption of law that the payee of notes secured by mortgage has transferred the notes before purchasing the equity of redemption from the mortgagor, and a person taking a mortgage from the payee will not be held chargeable with notice that the notes secured in the first mortgage, although not due, have been assigned, but he may rely upon the record as showing title in his mortgagor." This we think to be the correct rule, except where the mortgage shows upon its face the negotiable character of the notes it secures, in which event it might be incumbent on a subsequent purchaser to inquire as to whether the notes have been assigned: *Keohane v. Smith*, 97 Ill. 156; 1 Jones on Mortgages, sec. 814.

446 The mortgage before us does not describe the notes or otherwise indicate their character. In the absence of proof of notice to the Woodlawn Cemetery Company of the transfer of the note to Marbury, or of facts sufficient to put it on inquiry, the principles which govern the respective rights of Marbury and said company in this controversy may be briefly stated as follows: By the transfer of the note from Vann to Marbury, under the circumstances above shown, the

latter acquired an interest in the mortgage security which he was entitled to assert as against both the mortgagor and the mortgagee so long as the security subsisted. This being so, the cancellation of the mortgage on the records by Vann, it cannot be doubted, was a fraud upon the rights of Marbury, and the latter's rights remained unaffected as against all parties participating in, or cognizant of, the fraud.

But as between Marbury and the Woodlawn Cemetery Company the question here presented is whether Marbury's rights are such that they can be asserted against a *bona fide* purchaser from the mortgagor, who, without notice of the claim of Marbury, has parted with its money, relying upon the payment and cancellation of the only claim upon the land disclosed by the record, and which payment was made to, and cancellation made by, the party whom the record showed to be the proper party for such purposes.

As we have said, the transfer of the note vested in Marbury no legal title to the land, but simply an equity. The legal title to the conditional estate in the land remained in Vann as fully after the transfer as before. This legal title, it may be, he held in trust for Marbury to the extent of the note held by the latter, but it was a trust not appearing from the mortgage itself, or by any record, but a latent trust which could not affect the rights of *bona fide* purchasers, who, in ignorance of its existence, relied on the acts and declarations of the mortgagee within the scope of his apparent powers as legal owner of the mortgage; and any such acts of the mortgagee as would work an estoppel as against him would be equally effective against the holder of a latent equity arising from contract with the mortgagee: *Swartz v. Leist*, 13 Ohio St. 419.

Without discussing the question further our conclusion is, that Marbury, being a holder of the note as collateral security for an antecedent debt, and the mortgage failing to show that the note was negotiable, and the payment of the entire mortgage debt having been made by Mrs. Moore, and the purchase made by the Woodlawn Cemetery Company, <sup>447</sup> without notice by either of the transfer of the note, and in reliance upon the fact that the payment was made to, and the surrender of the mortgage by, the party whom the record showed was the proper party, and who then represented himself as the owner of the note, and that it was temporarily mislaid, such payment and purchase defeat the right of the

transferee, Marbury, to subject the land to the payment of the note, notwithstanding the failure of Mrs. Moore and the officers of the Woodlawn Cemetery Company to require the production and surrender of the note at the time of such payment and purchase.

The decree of the chancery court is not in accordance with our conclusion. It is therefore reversed, and a decree will be here rendered denying relief to the complainant in the court below, and dismissing the bill of complaint.

Reversed and rendered.

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**NEGOTIABLE INSTRUMENTS TAKEN AS COLLATERAL SECURITY—RIGHTS OF HOLDERS.**—A *bona fide* holder of commercial paper transferred as collateral security for a debt created either before or at the time of the transfer is entitled to enforce payment thereof without regard to equities existing between prior parties of which he had no notice: *Crump v. Berdan*, 97 Mich. 293; 37 Am. St. Rep. 345, and note; to the same effect, *Rosemond v. Graham*, 54 Minn. 323; 40 Am. St. Rep. 336. See further the extended note to *Griggs v. Day*, 32 Am. St. Rep. 712, and *National Bank v. Dakin*, 54 Kan. 656; 45 Am. St. Rep. 299.

**NEGOTIABLE INSTRUMENTS—ASSIGNMENT BEFORE MATURITY.**—Negotiable paper negotiated for value before maturity to a *bona fide* holder is not subject to any defense available against the payee nor to any setoff or recoupment: *First Nat. Bank v. Slaughter*, 98 Ala. 602; 39 Am. St. Rep. 83, and note. *Bona fide* holders of negotiable notes taken for value before maturity can recover thereon although they take them under circumstances which ought to excite the suspicions of prudent men: *Second Nat. Bank v. Morgan*, 165 Pa. St. 199; 44 Am. St. Rep. 652, and note.

**NEGOTIABLE INSTRUMENTS.—FORBEARANCE** to sue for the collection of an existing debt is not a sufficient consideration to support a transfer of a negotiable instrument to secure the original debt, so as to cut out a defense existing against such paper as between the original parties thereto unless there was a valid promise to forbear for some specific time: *Smith v. Bibber*, 82 Me. 34; 17 Am. St. Rep. 464, and especially note. See, also, *Davis v. Stout*, 126 Ind. 12; 22 Am. St. Rep. 565, and note.

**NEGOTIABLE INSTRUMENTS SECURED BY LIEN—RIGHT OF BONA FIDE HOLDERS.**—An innocent holder for value and before maturity of negotiable notes secured by mortgage takes the notes as well as the security freed from equities arising between prior holders and the mortgagor or mortgagees: *Nashville Trust Co. v. Smythe*, 94 Tenn. 513; 45 Am. St. Rep. 748, and note, with the cases collected.

## FIRST NATIONAL BANK OF BIRMINGHAM v. ALLEN.

[100 ALABAMA, 476.]

**BANKS AND BANKING—DUTY OF DEPOSITOR TO EXAMINE PASS-BOOK AND VOUCHERS.**—A depositor in a bank, who sends his pass-book to be written up, and receives it back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent and with due diligence, to examine the pass-book and vouchers and report to the bank without unreasonable delay any errors which may be discovered in them. Failing to do so to the injury of the bank, he cannot afterward dispute the correctness of the balance shown by the pass-book, and is liable to the bank for any loss sustained by it.

**BANKS AND BANKING—LIABILITY OF DEPOSITOR FOR ACTS OF AGENT—NOTICE TO AGENT AS NOTICE TO PRINCIPAL.**—A depositor in a bank, who, after having his pass-book written up by the bank and receiving it back with entries of debits and credits and his paid checks as vouchers for the former, has such pass-book and vouchers examined by his agent, who has forged a part of such checks, is chargeable with the facts within the knowledge of such agent at the time of such examination, and which should have been communicated to the bank.

**AGENCY—NOTICE TO DISHONEST AGENT AS NOTICE TO PRINCIPAL.**—A principal is chargeable with knowledge of such facts as his agent, whether honest or dishonest, acquires while acting within the scope of his business.

**BANKS AND BANKING—FORGED CHECKS.**—A bank is bound to know the signature of its depositors, and the payment of a forged check, however skillfully executed, cannot be debited against the depositor if he is wholly free from neglect or fault.

**BANKS AND BANKING—FORGED CHECKS—MEASURE OF LIABILITY OF DEPOSITOR.**—Damages sustained by a bank through the payment of a forged check as the result of negligence by the depositor is the extent of the measure of the liability of the latter to the bank.

**ACCOUNT RENDERED—PRESUMPTION.**—An account rendered, to which no objection is made after a reasonable time allowed for examination, is taken in law to be *prima facie* correct. This presumption may be overcome by proof.

**BANKS AND BANKING—FORGED CHECKS—LIABILITY OF DEPOSITOR.**—Though a depositor by his negligence has become liable for a forged check paid by his banker, yet, if the latter has recovered thereon from the forger, the liability of such depositor is only the amount remaining after deducting from the check the sum received from the forger.

**BANKS AND BANKING—FORGED CHECKS—NOTICE TO DEPOSITOR—LIABILITY OF BANK.**—If several checks are forged by the agent of the depositor and paid by the bank, after he is chargeable with notice that his agent is guilty of such forgeries, he is estopped from asserting a claim against the bank for the money paid on such checks by it.

**BANKS AND BANKING—FORGED CHECKS—NEGLIGENCE OF DEPOSITOR—LIABILITY OF BANK.**—A depositor furnished with monthly statements of his account with the bank cannot recover money paid by it on forged checks after he is chargeable with notice of such forgeries and fails to notify the bank thereof.

**BANKS AND BANKING—FORGED CHECKS—LIABILITY OF BANK.**—A bank depositor cannot charge the bank with the full amount paid out on a forged check simply on the ground that the stubs on his check-book show no similar amount, if such book shows a stub corresponding in number but for a less amount, and it is also shown that the forger who had access to such book sometimes altered checks by inserting a larger amount than that shown by the stub, and the depositor is unable to distinguish between the genuine and forged stubs.

**BANKS AND BANKING—FORGED CHECKS—LIABILITY OF BANK.**—A bank which has repaid to a depositor the amount paid out on forged checks, after the depositor is guilty of negligence in failing to notify it of such forgeries, can set up such payment as a counterclaim in an action by the depositor to recover the amount paid by the bank on forged checks prior to his negligence.

**BANKS AND BANKING—FORGED CHECKS—EVIDENCE.**—In an action by a depositor against a bank to recover the amount paid out by it on forged checks he may be asked to point out the genuine checks from a package partly genuine and partly forged, but his inability to do so is not conclusive against him.

**WITNESSES—NONEPERT OPINION—HANDWRITING.**—The rule which prohibits a nonexpert from giving an opinion based upon a comparison of handwriting has no application when the party whose name is signed is himself being examined as to whether the signature is his or not.

*E. K. Campbell*, for the appellant.

*B. M. Allen*, for the appellee.

480 **COLEMAN, J.** The plaintiff, Allen, a depositor, sued to recover money which had been paid by the defendant bank upon checks to which plaintiff's name had been forged by his clerk Tomlin. The forgeries covered a period extending from about the 5th of September, 1890, to March 4, 1891, at which latter point of time the forgeries were first actually known to the depositor. It was a rule of the bank, about once a month, to post up the depositor's pass-book and render him a statement, showing the deposits and checks and the balance. This rule was observed regularly in this case, and the forged checks, with other vouchers, were delivered to the depositor monthly from September 1890, to March 4, 1891, with his pass-book. The material defense of the defendant is stated in its special pleas marked D and E, the former of which, after stating the rule of the bank and the rendition of the monthly statement, and facts to show it acted with due care, avers that the plaintiff was negligent in his duty in not making proper examination of the monthly accounts rendered the plaintiff, and vouchers, which would have led to the discovery of the forgeries, and prevented the consequent loss to defendant. The latter plea (E) avers

substantially that defendant was furnished with the means in the pass-book and vouchers to detect the forgeries, and was so chargeable with notice thereof, and a neglect of duty on the part of the plaintiff to the defendant in not discovering the forgeries and informing the defendant in time to prevent the successful repetition of forgeries and subsequent loss to defendant.

<sup>481</sup> The court overruled a demurrer to these two pleas, and issue was joined upon them. The case was tried without the intervention of a jury, and judgment rendered for the plaintiff, from which judgment the defendant appeals.

It will be seen from this statement of the pleadings that the defendant received the benefit of the principle of law invoked by the defendant in pleas D and E, that a depositor owes a duty to the bank to examine, within a reasonable time and with due care, the account rendered in the pass-book and the vouchers returned by the bank to the depositor. We will refer to this principle again. As the court found for the plaintiff it must have found that the plaintiff, under the facts, was not negligent, and was not chargeable with knowledge of the forgeries in time to have prevented loss to the defendant, in consequence of forgeries perpetrated after the return of prior forged checks to the depositor with his pass-book.

Were the conclusions of the court authorized by the evidence? If as a matter of law, as is insisted by the plaintiff Allen, that the depositor owed no duty to the bank to examine the vouchers, then the conclusion of the court must be sustained, upon this principle, however negligent the depositor may have been in his examinations of the pass-book and vouchers. On this proposition the authorities are not in harmony. The case of *Weisser v. Denison*, 10 N. Y. 69, 61 Am. Dec. 731, may be considered as an authority sustaining the proposition that a depositor owes no duty to the bank, in the matter of the examination of the pass-book and vouchers. In the same line, but not so positive, may be cited *Welsh v. German-American Bank*, 73 N. Y. 424; 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *Manufacturers' Nat. Bank v. Barnes*, 65 Ill. 69; 16 Am. Rep. 576.

In the case of *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501, we observe the court uses this language: "It does not seem to be unreasonable, in view of the char-

acter of business and the custom of banks, to surrender its vouchers, on the periodical writing up of the account of its depositors, to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank which it would not have suffered, if such examination had been made, and the bank had received timely notice of objections, preclude the depositor from afterward questioning its correctness." In a yet later case, *Shipman v. Bank of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821, by a careful reading, it will be seen, that while the court held to the rule that the bank must know the signatures of its depositors, and must ascertain at its peril that the payee has in fact <sup>482</sup> indorsed the check, it does not affirm the rule that a depositor owes no duty to the bank to examine the account and checks returned. On the contrary, the conclusion of the court is rested upon the fact that the agent of the depositor, whose duty it was to examine the account as stated and the checks returned, did his duty fully, and that, notwithstanding the performance of his duty in this respect, the forgeries escaped detection. In the case last cited (*Shipman v. Bank of New York*, 126 N. Y. 318, 22 Am. St. Rep. 821) the facts show that it was not the duty of the forger, who was also in the employment of the plaintiff, to examine the pass-book and vouchers, but this duty devolved upon another employee. These New York cases were fully reviewed in the case of *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, in which a different rule is declared, and it is held that "A depositor in a bank, who sends his pass-book to be written up and receives it back with entries of credits and debits and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent and with due diligence, to examine the pass-book and vouchers, and report to the bank without unreasonable delay any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterward dispute the correctness of the balance shown by the pass-book.

The case of *Dana v. National Bank*, 132 Mass. 156, was one in which one Piper, the clerk of the plaintiff, erased the name of the payee and inserted the name of "bearer," and himself received the money. This check was returned with the pass-book and monthly statement as a voucher. The court uses this language: "The plaintiffs owed to the defendant the

duty of exercising due diligence to give it information that the payment was unauthorized, and this included due diligence not only in giving notice after knowledge of the forgery but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it, which consists in the knowledge of facts, which by the exercise of due care and diligence will disclose it, they failed in their duty; an adoption of the check and ratification of the payment will be implied." And in the case of *Weinstein v. National Bank of Jefferson*, 69 Tex. 38, 5 Am. St. Rep. 23, the rule was distinctly recognized, that, if loss or injury resulted to the bank in consequence of the negligence of the depositor to examine the account and vouchers within a reasonable time, which duty if performed would have led to the detection of forged checks, and prevented the loss, such neglect of duty was available to the bank in a suit by <sup>493</sup> the depositor to recover the amount of the forged checks. So in the case of *De Feriet v. Bank of America*, 23 La. Ann. 310, 8 Am. Rep. 597, it was held that a depositor should not recover the amount of a second forged check, he having failed to denounce as a forgery a previous check forged by his book-keeper, of which the depositor had knowledge, and failed to disclose the forgery of the first check to the bank. Other cases might be cited. The weight of authority and the best-considered cases hold, that the depositor owes a duty to the bank; and, when the character of the business, the relations of the depositor and bank to each other, and the purpose for which at prescribed intervals the account is stated, and pass-book and vouchers (the evidence of the bank) delivered to the depositor, are taken in consideration, the conclusion of these authorities is supported by sound reason and just principles.

Does the evidence show such omission of duty on the part of the plaintiff as to make him liable, and did loss result proximately to the defendant from such omission? The evidence shows that, on each occasion after the return of the pass-book and checks, the plaintiff, with the assistance of his clerk Tomlin, the forger, examined the account as rendered, and the checks, or vouchers. We may conclude the evidence shows that the plaintiff himself personally was without fault in this respect, and, but for the fact that his clerk Tomlin was the forger, the false checks would have been discovered by the examinations which were in fact made. The evi-



dence shows that in these examinations Tomlin either called from the pass-book, and the plaintiff the checks, or *vice versa*, and Tomlin, knowing when a forged entry or check was reached, answered in such a way as to deceive the plaintiff. Tomlin the clerk and forger had knowledge of the forged checks. Was such knowledge of the agent chargeable to his principal?

The case of *Dana v. National Bank*, 132 Mass. 156, holds that the principal is chargeable with notice under such circumstances, and we are of opinion the conclusion is supported by reason and sound principles of law.

It is clear that in forging the checks Tomlin did not act within the scope of his authority, but upon what principle can it be said that in the matter of examining the pass-book and vouchers he was not acting within the scope of his authority? He was appointed and directed by the plaintiff to do this very thing. If Tomlin had not been the forger, and in no manner interested in concealing the forgeries, and, in making the examination of the pass-book and vouchers, had <sup>494</sup> discovered that numbers of the checks were forgeries committed by other persons, would not such knowledge on his part be chargeable to the principal? The law is, that the principal is chargeable with the knowledge of such facts as the agent acquired acting within the scope of his business. Is the rule to be changed because of the dishonesty of the agent? His dishonesty cannot change his relationship to his principal, to the detriment of third parties. If the duty would have been within the scope of an honest clerk it is none the less within the scope of duty of a dishonest clerk. We have held that it was the duty of the depositor, by himself or an authorized agent, to examine the account, and vouchers or checks. If the agent employed by him to perform this duty is culpably negligent, is not the principal to be held liable for such want of due care on the part of the agent? Or if the agent, in making such examination, detects palpable forgeries, is not the principal chargeable with the knowledge of his agent? It can make no difference that the agent himself was the forger, and did not act within the scope of his authority in perpetrating the forgery. He was acting within the scope of his employment in the examination of the vouchers, and it then became his duty to his employer to make known the forgery, as much so as if the forgeries had been perpetrated by some other person, which were discovered

by him in the examination made. Our opinion is that under the circumstances the plaintiff was chargeable with the facts within the knowledge of his agent and clerk at the time of the examination of the pass-book and vouchers, and which should have been communicated to the principal or the bank. Certainly the bank should not suffer because of the fact that plaintiff's dishonest clerk prevented the plaintiff from doing his duty to the bank: *Dana v. National Bank*, 132 Mass. 156. What is the proper measure of relief to which the bank is entitled in such cases? Some of the courts have held that, if injury results to the bank by the negligence of the depositor, he will be held to have adopted and ratified the payment of the forged checks.

By others, under like circumstances, the doctrine of estoppel has been applied, and the depositor held to be estopped from asserting a claim to the money paid on the forged checks. We do not think that either the doctrine of ratification or estoppel can be applied as a just and equitable principle in all cases. Ratification refers to a past act or transaction, and, as now being considered, refers to the unauthorized act of an agent, or the adoption of a past act or transaction as his own act, made or executed by another who <sup>485</sup> was not an agent. It would strain the doctrine of ratification to hold that a person had ratified or adopted as his own the unauthorized act of another, of which he had no information, or which was promptly repudiated as soon as brought to his knowledge. So where a bank pays a forged check drawn in the name of one of the depositors, and the depositor is wholly free from neglect or fault, the bank owes the amount to the depositor. There was no act, omission to act, or silence, in such a case on the part of the depositor, which induced the bank to pay the forged check, or influenced the action of the bank in the payment of the check. No principle of the law of estoppel can be invoked by the bank against the depositor under such circumstances. The depositor owed the bank a duty, which was to examine the pass-book and vouchers with reasonable care and diligence. If the depositor failed in his duty in this respect, and the bank was injured in consequence of such omission of duty, the depositor became liable to the bank for all such damage. The extent of the liability of the depositor is commensurate with the loss sustained in consequence of his neglect of duty, no more, no less. It would be unjust, unfair to the depositor,

not sanctioned by any correct principle of law, to permit the bank to invoke the doctrine of ratification or estoppel which would exempt the bank from all liability incurred by its own neglect in the payment of the forged check, and in many cases inflict upon the depositor a greater loss than that caused to the bank by his neglect of duty. The damages sustained by the bank as the result of neglect of duty by the depositor are as susceptible of proof and measurement, as arise in any other case of breach of duty imposed by contract. The pleadings may be framed to present the issue in a proper manner.

An account rendered, to which no objection is made after a reasonable time allowed for examination, will be held in law as *prima facie* correct, but the presumption may be overcome by proof, either when the debtor is sued upon the account, if there is an error to his prejudice, or by the plaintiff by suing for the proper amount. An action for money had and received is not barred in this state until six years have expired, and up to that time a stated account is open to rectification upon proof. Neither will the fact that the bank has by mistake omitted, from the account rendered and vouchers returned, a proper charge, prevent the bank, within any reasonable time, from correcting the error and recovering back the omitted check, no injury having resulted to the depositor. Although a depositor may have failed in <sup>486</sup> his duty in not making the examination of his pass-book and vouchers, or did not exercise due care in the examination, or, having knowledge of a forged check, failed to make it known to the bank, and thereby become liable to the bank for an omission of duty, yet if, after this liability has accrued, the forger is arrested and the money in whole or in part is recovered by the bank, the damage to the bank by reason of the negligence of the depositor is not the whole amount wrongly paid out on the forgery, but the difference between that amount and the amount recovered back by the bank. So, also, if the depositor makes timely discovery of the forgery and discloses it to the bank, the bank is liable for the whole amount of the forged check to the depositor, notwithstanding by all diligence the bank failed to realize any thing from the forger. The correct principles by which the respective liabilities of the bank and depositor are determined are these: The bank is bound to know the signature of its depositors, and the payment of a forged check, how-

ever skillfully executed, cannot be debited against the depositor. From the relations the depositor and the bank bear to each other there is a duty also upon the depositor to examine his account and vouchers, and to make known to the bank any improper vouchers or charges returned, and where injury results to the bank from the failure of the depositor to do his duty in this respect the law holds the depositor liable for such injury, the result of the depositor's omission.

These principles of law apply in the present case to the forged checks which were paid by the bank in the first instance, and before the plaintiff was chargeable with knowledge of the forgery. Their application violates no established rule of law, gives neither an undue advantage of the other, and holds both responsible for the obligations growing out of their respective relations to each other.

The evidence shows that several checks were forged by Tomlin and paid by the bank subsequent to the time that Allen, the plaintiff, was chargeable with notice that his clerk was making such unauthorized use of his name. As to all such subsequent payments of forged checks the bank is entitled to invoke the equitable doctrine of estoppel. As to these it may be fairly said the bank was induced to pay and did pay in consequence of the silence of the plaintiff when it was his duty to speak. The bank was misled to its injury by the fault of the depositor. A very interesting and instructive collection of leading cases on the questions under <sup>467</sup> consideration may be found in the 26th volume of American Law Review for March and April, 1892, page 274.

We cannot believe from the evidence that if the plaintiff had promptly made known to the bank the forgeries of his clerk, at the time he was chargeable with a knowledge of their existence, the subsequent forgeries could have been successfully carried out. The evidence shows that upon this discovery of the forgery the plaintiff had Tomlin arrested, but his arrest, and even his conviction, would not necessarily reimburse the bank or exclude the doctrine of estoppel, and, as to the subsequently forged checks, we cannot see that the bank was under any obligation to prosecute the forger. As to the subsequent forged checks the fault was with the depositor.

Our conclusion is, the evidence supported the special plea of the defendant. We are of opinion the court erred in

arriving at the balance of money due the plaintiff. The evidence is not as clear as it might be made, but, as we understand the record, it shows that the forged checks, the cause of the present action, had been abstracted from the plaintiff's book, presumably by his clerk, who had access to it and the vouchers at all times. The plaintiff had a check-book with marginal space on which was entered the number of the check, the name of the payee, the amount of check and date, and, when the check was taken off, the stub showed these memoranda, and plaintiff testified that he was careful in every instance before signing the check to see that it corresponded with the stub. The balance against the bank was ascertained by charging to the bank payments made on checks for which there were no corresponding amounts entered on the stub of plaintiff's check-book. Under the evidence in this case we do not think this was sufficient data upon which to base a charge, for the following reasons: Tomlin, introduced as a witness by plaintiff, testified "that he frequently filled out the stubs, and also the checks for plaintiff's signature, but that he, Tomlin, had no authority to sign plaintiff's name; that several times in attempting to sign plaintiff's name he had not made what he considered a skillful forgery, and he destroyed such checks without uttering them, and that the stubs corresponding with such checks were left in the check-book filled out." "That sometimes when he committed a forgery he wrote the stub for one amount and the check for a different amount." It seems that neither the plaintiff, nor the witness Tomlin, by an examination of the stub of the check-book, could point out the instances in which forged checks were uttered. <sup>488</sup> The defendant's evidence showed that his cash-book did not disclose to whom the money on checks was paid, but only the date and amount; "that there were the same number of stubs on the plaintiff's check-book as there were of charges on the bank-book, but the several sums on the stubs were not the same, but usually smaller than the charges on the bank-book." Ordinarily it would seem that the plaintiff ought to be able to ascertain to whom he was indebted and the amount of such indebtedness; and, if he did not have the data himself, the payee, as shown by the stub on the check-book, was competent to testify, and ought to be examined on this point. If a genuine check was signed, and the amount raised by Tomlin, and the payee, in fact, received the amount

due him, the drawer's loss would be the difference between the amount expressed in the check as originally drawn and the amount paid by the bank and charged to the drawer. We do not know that any such case exists, but, in view of the evidence that the checks paid by the bank were returned as vouchers to plaintiff, and while in his possession were lost or stolen, and as plaintiff, by an examination of the stubs of his check-book alone, could not determine which were genuine and which were false checks, and as there were stub entries corresponding in number but not in amounts to those paid by the bank, and as the plaintiff's clerk and witness, himself, was the forger and testified that sometimes the check was altered by inserting a larger amount than entered on the stubs of the check-book, we are of opinion the payees of the check as shown by the stub should have been examined, if within the jurisdiction of the court. Without some proof that the depositor did not owe and draw checks as shown in the stubs the court was hardly authorized to charge the bank with the full amount of a payment, simply because the stub of the check-book showed no corresponding amount, when there was a stub which corresponded in number but for a less amount. If the stub corresponding in number was conclusive to show the check was forged, because the check called for a larger amount than the stub, it would not follow from this fact alone that the stub also was a forgery. There should be other evidence introduced on this point. The evidence shows that when Tomlin was arrested in March, 1891, he then had on his person eight of the last forged checks. In ignorance of the fact that the bank had knowingly paid forged checks drawn by Tomlin covering a period from September 7th, previous to the date of these forged checks, the bank promptly made good to the depositor <sup>489</sup> the amount of the eight checks found on the person of Tomlin. If the payment of these eight checks by the bank resulted from the omission of duty on the part of the plaintiff properly to examine his pass-book and vouchers prior to that time, and his neglect, if he was guilty of such neglect, in not making known to the bank the existence of previous forged checks, and if the money was paid under a mistake of fact, without notice, there is no legal reason why the amount of the eight checks do not constitute the basis of a counterclaim, available to the defendant under proper pleas. This conclusion would follow from the principles we have laid down as law.

There was no error in holding that checks which the stubs of the check-book showed were in favor of the city employees were forgeries, as we construe the evidence on this point. Plaintiff testified positively that he kept an order-book also with a margin for stubs. That whenever he loaned or advanced money to a city employee he invariably took the order of the borrower on the city treasurer, in the order-book, and that on the stub of the order-book the name of the employee, the date and amount were entered, at the time of giving a check on the bank to such employee, and that there were no entries on the stub of the order-book, to correspond with the stub of the check-book. From these data the plaintiff testified positively as to such checks, and thus supplied the omission which occurred as to the stubs in the check-book of which he was unable to say whether he had signed checks or not, and which in number corresponded with checks paid by the bank, the difference being that the amounts did not correspond.

Only one other question remains to be considered. The defendant took some of the checks found on the person of Tomlin, and which were forgeries, and others admitted to be genuine, and arranged them, so that nothing but the signatures of the drawer could be seen, and plaintiff was requested to point out the genuine and false checks. The plaintiff objected to this evidence, and the court sustained the objection. We think this testimony admissible. It is a circumstance that the jury or court should consider in weighing his evidence. The inability of the plaintiff to distinguish the true from the false signatures would not be conclusive against him. He might be able to show by other evidence that certain checks were forged, although he could not himself determine the question by an examination of the signature.

Doubtless in many cases a person's name is so skillfully forged that he could not distinguish it from his <sup>490</sup> own proper signature, and yet he may know from the amount or payee, or other facts, absolutely that the instrument was forged. We think, however, the fact that he cannot distinguish a signature, which he admits to be genuine, from that alleged to be false is a circumstance. The rule which prohibits a nonexpert from giving an opinion based upon a comparison of handwriting has no application where the

party whose name is signed is himself being examined as to whether the signature in question is his signature or not.

Reversed and remanded. —

**BANKS—DUTY OF DEPOSITOR TO EXAMINE PASS-BOOK.**—It is the duty of a depositor to examine his pass-book, and return it to the bank without unreasonable delay, with notice of his objections to it; and, unless such objection is made within a reasonable time, it becomes an account stated, casting the burden of proof on the depositor to show that a check with which he is debited is a forgery: *Janin v. London etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82, and note.

**BANKS—LIABILITY FOR PAYMENT OF FORGED CHECKS.**—The payment of forged checks is made at the peril of the bank, and it cannot charge them against the depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless, by his subsequent conduct in relation to the matter, he is equitably estopped to deny the correctness of such payment: *Janin v. London etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82, and note. See the note to *First Nat. Bank v. Northwestern Nat. Bank*, 43 Am. St. Rep. 259, where the cases are collected.

**AGENCY—NOTICE TO AGENT WHEN NOTICE TO PRINCIPAL.**—Notice to an agent acquired by him while transacting the business of his principal is notice to the latter: *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 519; 35 Am. St. Rep. 770, and note. See, also, the extended notes to *Trentor v. Pothen*, 24 Am. St. Rep. 228; and *Fairfield Sav. Bank v. Chase*, 39 Am. Rep. 323.

**ACCOUNTS—EFFECT OF ACQUIESCENCE IN.**—Long acquiescence in an account makes it a settled one: Note to *Bell v. Hudson*, 2 Am. St. Rep. 802. See, also, the note to *Devecmon v. Shaw*, 9 Am. St. Rep. 424.

## BIRMINGHAM MINERAL RAILROAD CO. v. PARSONS.

[100 ALABAMA, 602.]

**RAILROAD COMPANIES—LEGISLATIVE POWER TO COMPEL MAINTENANCE OF CATTLE-GUARDS.**—A statute requiring a railroad company to erect and maintain cattle-guards whenever demand is made upon it by the owner of land through which its road passes, with notice that such guards are necessary to prevent the depredation of stock upon his farm, is not unconstitutional in that it makes the landowner the sole judge of when such stock-guards shall be erected.

**RAILROAD COMPANIES—CONSTITUTIONAL LAW—CATTLE-GUARDS—DAMAGES.**—A statute providing that as to all stock passing over or through cattle-guards upon any line of railroad, and committing depredations and damages to the owners of land, the railroad company shall be liable for the full amount of such damages proven, together with costs, is unconstitutional, because it attempts to impose absolute liability, when the requirements of the act as to the erection and maintenance of stock-guards may have been fully complied with by the company and no negligence exists.



**CONSTITUTIONAL LAW.—STATUTES PARTLY VALID AND PARTLY VOID** may be enforced as to the valid part, provided it is separate from the void.

**ACTIONS—REMEDY.**—If a duty is imposed by statute, and no remedy is given for its breach, the remedy is by common-law procedure.

**RAILROAD COMPANIES — DUTY AS TO STOCK-GUARDS.** — Under a statute requiring a railroad company to erect and maintain cattle-guards it is not guilty of negligence in leaving them open, because it is not the intention of the statute to require the company to keep the guards closed.

**ACTION** to recover damages to crops caused by the failure of a railroad company to erect and maintain cattle-guards. Judgment for the plaintiff, and the defendant appealed.

*Hewitt, Walker & Porter*, for the appellant.

*Kennedy & Hickman, W. R. Houghton, and F. D. Nabors*, for the appellee.

¶ HARALSON, J. The demurrer to the complaint, which was overruled, presents a single question for our consideration—that of the constitutionality of the act of the legislature, approved December 11, 1886: Acts 1886–87, p. 163.

It is entitled, “An act requiring railroads to build, and keep cattle and stock guards in order, upon their respective lines of roads.” Its first section is, “That all railroads within the territorial limits of the state of Alabama shall be required to put in cattle or stock guards, upon their respective lines of roads, and keep the same in order, whenever the demand is made upon them, or their agents or employees, by ¶ the owners of the land through which said road passes, that said cattle or stock guard is necessary to prevent the depredation of stock upon their farms.”

The second section provides that on and after the passage and approval of the act, as to all stock passing over or through cattle-guards upon any line of railroads in this state, and committing depredations and damages to the owners of the land, the company shall be liable for the full amount of damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages, which damages can be recovered by suit in the justice or circuit courts of Alabama, where such damages were committed; provided that the railroad company can only be required to construct cattle-guards whenever said company’s road enters the field, or upon the premises of any person, or where the

premises, or any portion of the same, are exposed by reason of said road entering upon them, or running through them.

2. It is well understood that railroad companies are not bound by any principle of the common law to fence their roads, make cattle-guards, or erect any other barrier or stay against the intrusion of stock upon their roads or right of way, and are not liable for injuries happening merely for want of such erections: 7 Am. & Eng. Ency. of Law, 906, 912; 1 Rorer on Railroads, 614; *Memphis etc. R. R. Co. v. Lyon*, 62 Ala. 71. Whenever a company is under obligation to fence its right of way, or erect cattle-guards, it is by virtue of a contract or statute.

On the other hand, it is equally well settled that acts of incorporation of railroad companies are subordinate to the general police regulation of the state, and that the requirement to fence their right of way, and erect and maintain cattle-guards, falls legitimately within legislative authority.

As is well said in *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90: "The police power of a state is a most important power essential to its very existence, and has been declared by the supreme judicial interpreter of the federal constitution to embrace, 'the protection of the lives, health, and property of her citizens, the maintenance of good order, and the preservation of good morals; and the legislature cannot by any contract divest itself of the power to provide for these objects'": *Beer Co. v. Massachusetts*, 97 U. S. 25; *Van Hook v. City of Selma*, 70 Ala. 361; 45 Am. Rep. 85; *Louisville etc. R. R. Co. v. Baldwin*, 85 Ala. 619; 7 Am. & Eng. Ency. of Law, 907.

The unconstitutionality of the act we consider is insisted on: 1. "Because it requires the railroad to erect cattle-guards, ~~etc~~ whenever demand is made upon it by the owners that the cattle or stock guard is necessary to prevent the depredation of stock upon their farms, thus making the landowner the sole judge of the necessity, and from whose decision the railroad has no appeal. This objection relates expressly to the first section of the act.

The criticism cannot be sanctioned. This is a mere option which the statute gives the owner of the land. The guard if and when constructed is for his benefit alone. The public has no interest in it further than the general interest every good citizen feels that every other person shall be protected in his rights of property. And, of what detriment can it be

to the railroad that the owner is permitted to exempt it from a duty which, without his exemption, would be absolute, whether the owner needed or desired the cattle-guard or not? If the statute had simply required the companies to erect and maintain these guards, in all instances, whenever they entered the field or premises of a party, there could, under the authorities, be no objection raised to the validity of the law. Why, then, should the statute, if, in its enactment, it would lighten the burden, if any, of the corporations, without injury to the persons whom it was designed to benefit, by bestowing this option on them, incur judicial displeasure? The point of this suggestion becomes more pertinent when it is remembered that when the duty to fence or build cattle-guards is made absolute, without reference to an option on the part of the owner of the land, the owner may release the obligation, as seems to be well settled: 7 Am. & Eng. Ency. of Law, 907; 1 Thompson on Negligence, sec. 26, p. 526.

The case of *Owensboro etc. R. R. Co. v. Todd*, 91 Ky. 175, is opposed to this view, and holds that this power of police regulation cannot be delegated to the citizen. No authority upon which the decision is based is given. The constitution of this state certainly contains nothing against the bestowment of such an option on the landowner in connection with the exercise of this police jurisdiction and authority, and we are at a loss to see on what principle it can be denied. The states delegate this power without question in their creations of municipal governments, railroad commissions, medical and examining boards, quarantine commissions, the bestowment of the authority for the creation by the people of counties and parts of counties, of agricultural districts in which fences may be dispensed with, and stock not allowed to run at large, and in other instances, perhaps, which might be named; and it can be readily seen <sup>667</sup> that this police authority may be more safely and beneficially exercised often in leaving its exercise to the option of others, within prescribed and proper limitations, than without.

2. There can hardly be any question but that this second section imposes an absolute liability on railroad companies "for the full amount of the damages proven to have been sustained by the party damaged, and all costs accruing in the collection of said damages," whether they have failed, or not, according to the requirements of the law, "to put in cattle or stock guards upon their respective lines of roads

and keep the same in order." Indeed, this liability is clearly stated in the words of the section itself. There are many conflicting authorities on this question, which we will not review or attempt to reconcile. In the 7 American & English Encyclopedia of Law, 907, 913, it is stated that, "Statutes have been passed in England and many of the states requiring railway companies to fence their tracks (which includes cattle-guards), and holding them liable for all injuries occasioned by a failure to do so, irrespective of whether or not they have been guilty of negligence," in operating their trains, and many authorities, bearing more or less intimately on the question, are cited as supporting the text: 7 Am. & Eng. Ency. of Law, sec. 927.

Counsel for appellant, in their elaborate argument on the question, reviewing many of the authorities, conclude: "We concede that if the act of 1886 had imposed absolute liability in cases where the railroad fails to erect gaps at all, in compliance with the statute, this would have been a valid police regulation, because a penalty imposed for a violation of the act. But the act of 1886 goes further, and imposes such absolute liability on the railroad, though it may have fully complied with the act in erecting and keeping in order its gaps, provided stock get over them and commit depredations. It is therefore manifestly unconstitutional, because it attempts to impose absolute liability, when the requirements of the act may have been fully complied with, and no negligence exists. This is not a valid police regulation."

This question is not a new one in this court. In *Zeigler v. South & North Ala. R. R. Co.*, 58 Ala. 594, we had occasion to pass upon the validity of an act which provided, "That from and after the passage of this act, all corporations, person or persons, owning or controlling any railroad in this state, shall be liable for damages to livestock, or cattle of any kind, caused by locomotive or railroad cars." It was there ~~was~~ said of that statute, that it dispensed with all proof of the wrong it seeks to redress." It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a semblance of fault, negligence, or want of skill in its employees; an injury, which no human prudence or foresight could prevent; and yet, the statute will not allow the railroad to exculpate itself, by proof of the highest qualifications and most watchful vigilance. This falls short of due

process of law. . . . We can perceive of no reason, in law or morals, for holding them (railroad companies) to a stricter measure of accountability for inevitable misfortunes, than would be exacted from natural persons for injuries which result from unavoidable accident; or accidents which no human prudence can foresee or avert." This case, in these utterances, has been many times approved by us and other courts: *Wilburn v. McCalley*, 63 Ala. 436; *Mead v. Larkin*, 66 Ala. 87; *Davis v. State*, 68 Ala. 58; 44 Am. Rep. 128; *Green v. State*, 73 Ala. 26; *Nashville etc. R. R. Co. v. Hembree*, 85 Ala. 481.

Under the influence of these decisions we are constrained to hold that the second section of said act, in that it imposes an absolute liability on railroad companies, irrespective of compliance on their part with the duties prescribed in its first section, and without any fault on their part, is in violation of constitutional right.

The first section, however, without reference to the second, and independently of it, prescribes the duty on these companies, "to put in cattle or stock guards upon their respective lines of road and keep the same in order," and for a failure to do so they are liable to the party injured by their neglect. To prescribe the duties imposed by this section, we have seen, is a valid exercise of the power of the state. It may be maintained as such separate from the second section: 3 Brickell's Digest, sec. 28, p. 128; *Ex parte Cowert*, 92 Ala. 94.

And, "every person while violating an express statute is a wrongdoer, and as such is *ex necessitate* negligent in the eye of the law, and every innocent party injured thereby is entitled to a civil remedy therefor"; and, when a duty is required and no remedy provided for its breach, the remedy is by common-law procedure: *Grey v. Mobile Trade Co.*, 55 Ala. 387; 28 Am. Rep. 729; *Lowndes Co. v. Hunter*, 49 Ala. 507; *Aulauga Co. v. Davis*, 32 Ala. 703.

3. The demurrer to the first and third counts in the complaint were properly overruled.

\*\*\* The second count bases a recovery on the allegation that the defendant "so negligently and carelessly left open their stock-gaps on that part of its said road which runs through the said land of the plaintiff, that," etc.—specifying the damages suffered.

We are not certain of what is meant by leaving stock-gaps open, and what negligence is attributed to defendant in so

doing. Consulting our knowledge of such barriers against stock we would suppose they were never designed to be closed, but always open. The duty prescribed by the statute is to put in cattle-guards and keep them in order, and not to keep them closed. It would seem, therefore, that defendant violated no duty to plaintiff in keeping the gaps open, and the demurrer to the second count, for this reason, should have been sustained.

For this error the judgment of the court below is reversed and the cause remanded.

Reversed and remanded. —

**RAILROADS—ERECTION OF CATTLE-GUARDS.**—The legislature may, under the police power, require existing railroads to erect and maintain cattle-guards at all crossings under penalty of paying all damage caused by their neglect to comply with such requirements: *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140; 62 Am. Dec. 625. Fences and cattle-guards must be erected and maintained by the Vermont Central Railroad Company upon their road sufficient to prevent horses and other animals from passing thereon: *Trow v. Vermont Cent. R. R. Co.*, 24 Vt. 487; 58 Am. Dec. 191. See, also, the note to *Memphis etc. R. R. Co. v. Kerr*, 20 Am. St. Rep. 162.

**STATUTES VOID IN PART.**—Although part of a statute is unconstitutional the remainder is not to be declared unconstitutional also if the two parts are separable so that the latter may stand, though the former is of no effect: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278, and note; *Mayor v. Shattuck*, 19 Col. 104; 41 Am. St. Rep. 203. See, also, *Singer Mfg. Co. v. Fleming*, 39 Neb. 679; 42 Am. St. Rep. 613.

## FOX v. McDONALD.

[101 ALABAMA, 61.]

**CONSTITUTIONAL LAW—FUNCTION OF DIFFERENT DEPARTMENTS OF GOVERNMENT.**—A constitution distributing the powers of government into three departments, to wit, legislative, executive, and judicial, gives to each department exclusive authority over the subject to be committed to it, and the legislature cannot depute the performance to one department of a function essentially pertaining to another, but there are functions which are often performed by one of these departments of such a character that their performance does not necessarily belong to it, and, where such is the case, the authority of the department is not necessarily exclusive, and another department may be required to perform the same or a similar function.

**CONSTITUTIONAL LAW—INTERPRETATION.**—Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption. Hence if, before the adoption of a constitution, there were local boards, tribunals, and officers exercising functions partly legislative, partly executive, and partly judicial in their nature, the

fact that by such constitution the powers of government are classified into three departments, and the members of each department forbidden to exercise the powers belonging to another, will not prevent the legislature from authorizing the exercise by such boards, tribunals, or officers of the powers before possessed by them, though their exercise may involve functions which in their nature are not restricted to a single one of these departments.

**PUBLIC OFFICERS.—THE GOVERNOR HAS NO POWER TO APPOINT OFFICERS** except when such power has been conferred by some constitutional or valid legislative provision.

**CONSTITUTIONAL LAW—PUBLIC OFFICERS, POWER OF APPOINTMENT, TO WHAT DEPARTMENT BELONGS.—**The power to appoint or elect to office does not necessarily belong to either the legislative, executive, or judicial departments. It is commonly exercised by the people, but the legislature may, as the lawmaking power, when not restricted by the constitution, provide for its exercise by either department of the government, or by any person or association of persons which it may choose to designate for that purpose. The function is legislative, executive, or judicial when the law has confided its exercise to the legislative, executive, or judicial department of government.

**CONSTITUTIONAL LAW—PUBLIC OFFICERS.—THE POWER OF APPOINTING A PUBLIC OFFICER MAY BE DELEGATED** to the probate judge when the constitution has not otherwise provided for his appointment.

**CONSTITUTIONAL LAW.—A MUNICIPAL CORPORATION IS NOT DENIED THE RIGHT OF LOCAL SELF-GOVERNMENT UNDER A STATUTE** authorizing the appointment of certain of its officers to be made by the probate judge.

**MUNICIPAL CORPORATIONS, OFFICERS OF, RESIDENCE OF WITHIN CITY, WHEN REQUIRED.—**A statute authorizing a probate judge to appoint commissioners to exercise complete supervision over the police officers of a designated city, and to prefer charges against them for such acts as may justify their removal, implies that the appointees shall be residents of such city.

**CONSTITUTIONAL LAW.—IF A STATUTE CAN BE SO CONSTRUED AS NOT TO OFFEND** against any constitutional limitation, such construction will be indulged.

**STATUTES, WHEN GO INTO EFFECT.—**Legislative enactments go into immediate operation, unless by force of some general law or provision contained in the act itself, its operation is postponed to some subsequent date.

**PUBLIC OFFICER, RIGHT TO OFFICE WHEN TERMINATES.—**An enactment giving authority to a designated person or officer to appoint certain public officers puts an end to the term of office of all incumbents deriving their authority from another appointing power whose authority to make further appointments is annulled by such enactment.

**CONSTITUTIONAL LAW—EXPRESSING OBJECT OF STATUTE IN ITS TITLE.—**In a statute entitled "An act to establish a board of commissioners of police for the city of Birmingham" there must be inserted all powers necessary to the efficient administration of the police power of that city by commissioners, including the power to appoint police officers to take the place of those previously appointed and acting.

**NOTICE, OFFICIAL.—THE MAYOR OF A CITY IS BOUND** to take official notice of the appointment of police commissioners therein and of the necessary officers by them elected.

**PUBLIC OFFICE, APPOINTMENT TO, WHAT IS.**—Though the action of an appointing board purports to be a ratification of a previous appointment such action is necessarily a reappointment.

**MANDAMUS MAY ISSUE TO COMPEL THE MAYOR OF A CITY TO ADMINISTER AN OATH OF OFFICE** where the law requires him so to do.

**MANDAMUS** against the mayor of the city of Birmingham to compel him administer to T. C. McDonald of that city an oath of office as chief of police. The resistance to the application for the writ was based upon constitutional grounds, the respondents insisting that the power to appoint to office was essentially executive in its character and could not be conferred upon the probate judge as required by the act under which the petitioner claimed title to his office, and further, that that act, by attempting to invest the probate judge with authority to make these appointments, was an invasion of the powers of local self-government assured to the municipality of the state.

*Gregg & Thornton, Brooks & Brooks, and James E. Hawkins,* for the appellant.

*Cabaniss & Weakley, contra.*

¶ **HEAD, J.** On December 12, 1892, the general assembly passed "An act to establish a board of commissioners of police for the city of Birmingham, Alabama"; which act provides for the appointment, by the probate judge in and for Jefferson county, of a board of commissioners of police for said city, consisting of five persons, and defines its powers and duties, among which are to appoint a chief of police and such other police officers and policemen as is or may be prescribed by city ordinance, and to exercise full direction and control of the officers and members of the police force in conformity to existing and future laws and ordinances on the subject. Accordingly, the probate judge appointed five persons, who entered upon the duties of their offices, and, as a board, appointed T. C. McDonald to the office of chief of police, who thereafter presented himself to David J. Fox, the mayor of the city, for qualification, and demanded that the oath of office be administered to him; it being the duty of the mayor, under city ordinance, to administer the oaths of office to the officers of police. Fox declined to administer the oath, and McDonald applied to the city court of Birmingham for the writ of mandamus compelling him to do so. From an order of the court granting the peremptory writ Fox appealed to this court.



This act is assailed by the appellant as unconstitutional, on several grounds. We will notice first, the chief contention, that it offends sections 1 and 2 of article III of the constitution. These are as follows:

**"ARTICLE III. DISTRIBUTION OF POWERS OF GOVERNMENT.**

**"SECTION 1.** The powers <sup>of</sup> of the government of the state of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

**"SEC. 2.** No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

It is contended that the act in question is violative of these provisions for the reason, that the probate judge, upon whom the power of appointing the commissioners is conferred, is of the judicial department of the state government, while this power of appointment so conferred upon him properly belongs to the executive department, within the meaning of the constitutional provisions quoted.

To solve the question thus presented we must learn what these provisions mean. Noticing them analytically we observe, first, that the general purpose of the article is the distribution of the powers of the government of the state; and to that end it is declared, first, that those powers shall be divided into three distinct "departments"; secondly, that each of these "departments" shall be confided to a separate "body of magistracy," to wit, those powers which are legislative, to one; those which are executive, to another; and those which are judicial, to another; and, thirdly, that no person, or collection of persons, being of one of those "departments" shall exercise any power properly belonging to either of the others, except in the instances expressly directed or permitted. Thus we see that the powers of government distributed are those which are divided into the three departments, and, by these three divisions or departments, confided to separate bodies of magistracy. First, then, what are we to understand by the terms "departments" and "body of magistracy," as they are here used? How are these bodies of magistracy to whom these powers are to be confided to be

created and made known? Of whom or what shall they consist? We get definite and complete information upon this subject from the three succeeding articles of the constitution itself, viz:

**"ARTICLE IV. LEGISLATIVE DEPARTMENT.**

**"SECTION 1.** The legislative power of this state shall be vested in a general assembly, which <sup>64</sup> shall consist of a senate and house of representatives."

**"ARTICLE V. EXECUTIVE DEPARTMENT.**

**"SECTION 1.** The executive department shall consist of a governor, secretary of state, state treasurer, state auditor, attorney general, and superintendent of education, and a sheriff for each county.

**SEC. 2.** The supreme executive power of this state shall be vested in a chief magistrate who shall be styled the governor of the state of Alabama."

**"ARTICLE VI. JUDICIAL DEPARTMENT.**

**"SECTION 1.** The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, a supreme court, circuit courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and such persons as may be by law invested with powers of a judicial nature."

The term "departments," it will be observed, is first used to denote the three parts or divisions into which the powers of government are to be divided; but in the context it is used interchangeably with the term "body of magistracy," to denote the governing bodies to which the powers of government are respectively confided. Here, then, we have a department or body of magistracy consisting of a senate and house of representatives to which is confided the legislative power; a department or body of magistracy consisting of a governor, secretary of state, state treasurer, state auditor, attorney general, and superintendent of education, and a sheriff for each county, to which is confided the executive power, the supreme executive power being vested in the governor; and a department, or body of magistracy, consisting of the senate, sitting as a court of impeachment, supreme court, circuit courts, courts of probate, such inferior courts of law and equity, to consist of not more than five members, as the general assembly may from time to time establish, and

such persons as may be by law invested with powers of a judicial nature, to which is confided the judicial power, intended by the constitution to be distributed. When we speak, therefore, of the legislative department let us be understood to mean, as the constitution intends, the senate and house of representatives; of the executive department, the governor and other officers above named with him; and of the judicial department, the senate sitting as a court of impeachment, the <sup>65</sup> courts and so forth, above named, as constituting that department. Keeping these definitions in view, we can the better determine the vital question arising upon the contention now under discussion in this cause, which is, What powers of government does the constitution intend shall be confided to the exercise, respectively, of these several governing bodies? Now, it must be conceded that the powers thus vested in these several departments are intended to be committed to their exclusive exercise; and this, independently of the provision that no person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others. Thus, for instance, the legislative power intended to be vested in the general assembly cannot be delegated to any other body, whether such body be of either the other defined departments or not, but must be exercised exclusively by the general assembly itself. So, also, an executive power intended to be vested in the executive department cannot, by legislation, be vested in any other person or body, whether such person or body be of either of the other departments or not. For instance, the pardoning power, or the power to fill vacancies in certain specified offices, being, by the constitution, vested in the governor, cannot, by legislation, be transferred to another, but must be exercised by the governor exclusively. As this is so, in reference to acts expressly confided to a particular department, so also must it be true with reference to acts which, by construction or implication, are confided to that department. To repeat, all acts expressly or impliedly assigned to a department by the constitution must be performed by that department, and the power to perform them cannot be conferred elsewhere: Cooley on Constitutional Limitations, marg. p. 115.

We return then to the question: What powers does the constitution intend shall be thus confided to the exclusive exercise, respectively, of these several governing bodies?

The insistence in argument of counsel for appellant, or that to which it leads, is, that, except in cases otherwise provided by the constitution itself, every act which is legislative in its nature and which pertains to, or in any wise affects, the government of the citizen, or which controls and regulates the conduct of citizens in their mutual intercourse, wheresoever within the state such government <sup>or</sup> or control is to be accomplished, and for whatsoever purpose such accomplishment is intended, must be exercised by the state legislative department; that all acts which are of a judicial nature, affecting the government of the citizen, or pertaining to the enjoyment, enforcement, or administration of the laws of the land, must be exercised by the state judicial department, or some member of it; and, likewise, that all such acts which are of an executive nature must be exercised by the state executive department, or one of the designated officers composing it. The argument is that the nature of the act to be performed must, in every instance, determine the question; and that nature being found to be legislative, executive, or judicial, the performance of the act must be assigned to the appropriate state department. We are quite clear the contention takes a step too far. Now, it is certain that all powers which are, by the constitution itself, expressly or by necessary implication, referred to the exclusive exercise of these departments must be so exercised. There are many such provisions, but none of them provide for the appointment of officers of the kind here involved created by legislative enactment. All other powers, not expressly designated in the constitution itself, intended to be confided to the exclusive exercise of the departments thereby created, must be ascertained by construction. It is a well-settled principle that constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption; and we look at the antecedent government, consider its system, as a whole and in its several parts, and the experiences and practices of its administration; and we consider and weigh the evils of the old system which the people intended to cure by the new. Thus aided, we interpret those provisions which require construction, and determine what the intention of the framers of the instrument was, and give effect to that intention; and it not infrequently occurs, in the exposition of written laws, both constitutional and statutory, that the letter of a provision will be justly made to yield to a

manifest intention in opposition to it, derived by construction alone. When we take our constitution, therefore, and read it in the light of this history, we see plainly that it was not intended to declare that every act pertaining to government and the regulation of the social <sup>67</sup> and property rights of the citizen should be exercised exclusively by the legislative, executive, or judicial department of the state government, or some member of it, according as the act possessed a legislative, executive, or judicial character; for we find there are many such acts especially peculiar to the very nature of our system, and necessarily inherent in it, which, time out of mind, have not been exclusively exercised by these departments, and which, for the ease and efficiency of our system, could not be so exercised. For illustration, confine literally all power of a legislative nature to the general assembly, and we strike down, at once, all governments of towns and cities, by and through municipal corporations, whose very existence and efficiency depend upon the legislative, executive, and judicial powers with which, by their nature, they must be clothed, and which they have ever, under the legislative authority of the state alone, been accustomed to exercise.

In the light of long-established usage and experience we construe the constitution, and determine that its framers never intended to interfere with the right of municipal corporations, under legislative sanction, to exercise these functions of government. It is true that, under the present constitution, it may be said that the right to create municipal governments with their usual powers is recognized or provided for, but with the same provisions distributing the powers of government as those now in force, contained in the constitutions of 1819, 1861, and 1865, and with no mention in those instruments of authority in the general assembly to create municipal corporations, the general assembly, from 1819 to the present time, has exercised that authority, and the corporations so created have exercised the powers so conferred without objection or suggestion from any source that such exercise was not within constitutional authority, on the assumption that all legislative, executive, and judicial power was, by the constitution, confided to certain other designated bodies of magistracy. When we read upon this subject we find the books teach us that the spirit of localized government, by local territorial subdivisions, carried on through subordinate governmental agencies, found early root and

growth in the notions of English liberty and polity; and we are told that from an immemorial or early period the local territorial subdivisions <sup>66</sup> of England, such as shires, towns, and parishes, enjoyed a degree of freedom, and were permitted to assess upon themselves their local burdens and to manage their local affairs; and Judge Dillon declares that our ancestors, in the settlement of this country, brought these notions with them, and that they found here a field of unexampled extent for their free development. Accordingly, he says, the system of intrusting the direction of local affairs to the local constituencies had from the earliest colonial periods been carried on by us to a much greater extent than in England; and, he observes, as you pass from one end of this country to another, alike in the oldest regions and in the newest organized settlements, you find the affairs of each road district, school district, township, county, town, and city locally self-managed, including the administration of local justice. This policy of creating local police and municipal corporations, he declares, is exhibited in all our legislation, and expressly or impliedly guaranteed in our state constitutions. And Judge Cooley, speaking of the powers of legislation commonly bestowed upon municipal corporations, says, that such bestowal is not to be considered as trenching upon the maxim that legislative power must not be delegated, since that maxim is to be understood in the light of the immemorial practice of this country and of England, which has always recognized the propriety and policy of vesting in the municipal organizations certain powers of local regulation, in respect to which the parties immediately interested may fairly be supposed more competent to judge of their needs than any central authority: Cooley on Constitutional Limitations, marg. p. 118. The conventions which framed our several constitutions, therefore, had no need to expressly reserve to municipal corporations the legislative, executive, and judicial power so long wont to be exercised by them, when, in the distribution of the powers of the government of the state, they declared that the legislative, executive, and judicial power should be confined to the respective departments or bodies of magistracy by them created and defined. The reservation arose by implication out of the existing order of things. Again: if all functions of government of a legislative, executive, or judicial character properly belong to, and are, therefore, to be exercised exclusively by,

the several departments created by the constitution, what shall become of the multiform powers and duties which, by legislative enactment, without express constitutional authority, have so long been conferred upon, and exercised by, the various officers appointed to perform functions of government in the several counties, and who are not made members of either of those departments? Has it ever been thought that the executive and ministerial, and indeed, in some instances, the judicial or *quasi* judicial; functions of the tax-assessor, tax-collector, county treasurer, coroner, county surveyor, and clerks of courts, to which may be added the officers and boards of control of our state institutions for the care of the insane, and deaf, dumb, and blind, and our state and county medical boards, for the preservation of the public health, properly belong to the several state bodies of magistracy created by the constitution, within the spirit and intent of that instrument, and must, therefore, be confided to the exclusive exercise of those bodies? None will so declare. Indeed, we have in our system, in opposition to the letter of the constitutional provisions under review, striking illustrations of the blending of legislative, executive, and judicial power in the same persons or bodies, which it has not been, and will not be, supposed our several constitutions intended to inhibit. In Clay's Digest, and in each compilation of our laws since, we find the creation of a court of county commissioners. This body is an inferior court created by law, and belongs, under express provision of each of our constitutions, to the judicial department of government; yet, we find, in its very creation, it was, and has ever since been, endowed with legislative and executive powers. In fact its chief duties are of those characters. It is given the power to levy and assess taxes for the support of the county government, which is a legislative function: Cooley on Constitutional Limitations, marg. pp. 479, 488. It is given power to direct and control the property of the county; to examine and audit the accounts of the receiving and disbursing officers of the county; to make rules and regulations for the support of the poor; and it is given plenary and executive powers over the erection and maintenance of public roads, bridges, and ferries, and the appointment of the necessary officers in that behalf. These are functions which do not inherently pertain to the judiciary, yet none will say, in view of their <sup>70</sup> long-continued and useful exercise by the court of county com-

missioners, without let or hindrance, that the constitution in distributing the powers of government intended to inhibit such exercise. So, also, the sheriff, who is expressly made a member of the executive department, has ever been empowered, by legislation, to perform the judicial function of approving bonds necessary to be taken by him in the administration of the laws. Clerks, registers in chancery, commercial notaries, and commissioners of deeds, under constitutions in terms confining judicial power to the courts, have long exercised, under legislative sanction only, the power of taking acknowledgments of conveyances, which this court has declared to be of a judicial nature. The coroner is so far an executive officer that he may execute process upon, and arrest the sheriff himself, who is, by the terms of the constitution, a member of the state executive department, and yet it has never been supposed that he may not, with constitutional favor, perform the judicial function of holding inquests. Other illustrations might be given, but these suffice to make clear the principle that the constitution must receive an enlarged and liberal interpretation, and the intention of its framers ascertained upon a broad view of the history and experience, the needs and usages of the time, and the great general purpose they had in view of framing a comprehensive and beneficent government. Thus viewed, we irresistibly conclude that it was not the intention of the constitution to declare that all these powers and duties, so indispensable to efficient government, and so long exercised, under legislative sanction only, by these officers and agencies of legislative creation, properly belong to the legislative, executive, or judicial body of the magistracy created by the constitution, because alone they may partake of a legislative, executive, or judicial nature.

We come then to the concrete question: Does the power to fill vacancies in office by appointment "properly belong" to the executive department of the state government, to be exercised exclusively by that department, within the meaning of the constitution? It may be regarded as a fundamental policy of our system of state governments in this country that the selection of persons to perform the offices and functions of government shall be left to the people themselves to be exercised at <sup>71</sup> the ballot-box. Indeed, the right and attribute of the people in respect of the selection of their own officers, by methods which they may prescribe in their written constitutions and laws, are so firmly fixed in our institutions that the



people themselves could not throw them off, to the extent of destroying our republican forms of government, for the people of the states have confided to the central government of the United States the power and duty to guarantee to every state in the union a government republican in form: U. S. Const., art. 4, sec. 4. The inherent nature and essence of the act of selecting officers of government, therefore, in view of this established policy, describe it as one properly belonging to the people, through the ballot, and not to any particular department of government to be exercised by representatives of the people. The filling of vacancies in office, pending the action of the people, by appointment of their representatives clothed by law with that authority, is, as a rule, an expedient merely, evoked by the convenience and necessities of government growing out of the nature of our system. In the nature of things the people cannot be always called upon to act immediately when the selection of a person is necessary to the exercise of a function of government; hence, it has been customary and essential to provide other means of appointment in cases to which this necessity gives rise. Furthermore, in our experience, wisdom has dictated that particular offices be filled exclusively by appointment of some governmental agency other than the vote of the people themselves, and this, and the agencies for such appointments, and the methods of filling vacancies in offices elective by the people, have been expressly manifested and prescribed in our constitutions or laws. It was necessary that they be so prescribed, for otherwise the right of such appointment resided nowhere; it belonged to no department of the government. With us the governor has no prerogatives. He must find warrant in the written law for his every official act. He has no more power to appoint officers, when not expressly conferred, than has the president of the senate, who is of the legislative, or the chief justice of this court, who is of the judicial, department; and when we go back to our constitution and laws in this state, from the beginning of the state government to the present, <sup>73</sup> we find it has been the policy to distribute this appointing power among the several departments of the state. We need not specify. The instances will readily occur to the minds of those familiar with the constitutions and laws. It may be true that the governor has been invested with the greatest share of this power, but no principle or policy has been declared that the power inher-

ently belongs to him. And we may remark that the fact that all our constitutions, in assigning appointive power to the governor, have specifically designated the particular officers to whom it applied, furnishes cogent argument that the people did not regard the power as necessarily or inherently belonging to him.

In what we have said we have pretermitted inquiry whether or not the act of appointing an officer is inherently of an executive character; and we have endeavored to show that whether so or not, it is not such an act as, upon a proper construction of the constitution, properly belongs to the executive department. The weight of authority joins issue upon the proposition that it is inherently of that character. The supreme court of California declares it possesses judicial characteristics. Says that court: "The person to be appointed is required to have certain qualifications. He must be a citizen of the United States and of the state, and a resident and qualified voter of the city and county, and he must be of good repute for honesty and sobriety, and he is required to produce evidence to this effect. . . . The examination of these questions, passing upon the sufficiency of the evidence, and determining whether the candidates possess the requisite qualifications, are certainly functions partaking essentially of a judicial character": *People v. Provines*, 34 Cal. 520. In *People v. Morgan*, 90 Ill. 562, it is said: "The executive power in a state is understood to be that power, wherever lodged, which compels the laws to be enforced and obeyed. And the instrumentalities employed for that purpose are officers elected or appointed, who are charged with the enforcement of the laws. But the power to appoint is by no means an executive function unless made so by the organic law or legislative enactment." In *Mayor of Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572, it is said: "We are not prepared to admit that the power of appointment to office is a function intrinsically executive, in the sense in which we understand the position to have been taken; namely, that it is inherent in, and necessarily belongs to, the executive department. Under some forms of government it may be so regarded, but the reason does not apply to our system of checks and balances in the distribution of powers where the people are the source and fountain of government, exerting their will after the manner and by instrumentalities specially provided in the constitution."

In *People v. Freeman*, 80 Cal. 233, 13 Am. St. Rep. 122, that court again held that the power of appointment to office is not essentially an executive function, and may be regulated by law. Judge Christiancy, in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, had under consideration whether the legislature could appoint persons to fill offices created by it; and his purpose was to determine whether such appointment could be treated as a legislative act which it was competent for the legislature to perform; and, in discussing the question, he says: "Besides the power to make general rules for the government of officers and persons, and regulating the rights and classes of persons or of the whole community, there is a large class of powers recognized as legislative, occupying an intermediate space between those of a judicial character on the one side and the executive on the other, and which are not, and cannot be, marked off from these by any clear line"; and further on he says: "As to this mode of appointment, being the exercise of a power essentially executive in its nature, it is sufficient to say that executive power cannot always be defined by any fixed standard in the abstract. What would come within the executive power in our form of government would fall within the legislative in another, and *vice versa*. The question here is, whether, under our constitution, it is executive or legislative; and as the constitution has not confided the appointment of those or of the like officers to the executive authorities, and has left it to the legislative discretion whether to create such offices, and how they shall be filled, it cannot be truly said that such an appointment is any more in the nature of the exercise of an executive than a legislative power." In harmony with these decisions, see *State v. Constantine*, 42 Ohio St. 441; 51 Am. Rep. 833; *People v. Woodruff*, 32 N. Y. 384. There are decisions to the contrary: *Taylor v. Commonwealth*, 3 J. J. Marsh. 401; *State v. Kennon*, 7 Ohio St. 561; *Achley's case*, 4 Abb. Pr. 35; <sup>74</sup> *State v. Noble*, 118 Ind. 350; 10 Am. St. Rep. 143, and other cases from that state. These Indiana cases give the question full discussion, and they appear to be the only well-considered cases in support of their doctrine. Mr. Freeman, in an exhaustive note in 13 American State Reports, on page 125, reviews all the authorities upon this subject, and states his conclusion from them in the following language: "The truth is, that the power of appointing or electing to office does not necessarily and ordinarily belong to either the

legislative, the executive, or the judicial department. It is commonly exercised by the people, but the legislature may, as the lawmaking power, when not restrained by the constitution, provide for its exercise by either department of the government, or by any person or association of persons whom it may choose to designate for that purpose. It is an executive function when the law has committed it to the executive, a legislative function when the law has committed it to the legislature, and a judicial function, or at least a function of a judge, when the law has committed it to any member or members of the judiciary." What he has said meets with our approval.

It is again objected that the act is unconstitutional, in that it denies to the city the right of local self-government. This contention is based on the power given the probate judge to appoint the commissioners, and upon the further assumption that the act empowers them to appoint persons who are not members of the municipality, who do not reside within the city. There is no force in the objection so far as concerns the designation of the probate judge as the appointing power. We have reached the conclusion that the probate judge may lawfully appoint the commissioners. With that act his duties end. He takes no part in administering the city government. The case is exactly the same as if the appointing power had been conferred upon the governor, instead of the judge of probate, and we apprehend it would not be contended in that case that the local government of the city was for that reason interfered with. The persons appointed commissioners exercise the functions of government conferred upon them by the act, and not the person who appoints them. But the other proposition may deserve more serious consideration. Upon mature reflection we do not deem it necessary to decide what the effect upon the act would be, in respect of its constitutionality, <sup>75</sup> if the construction of the act thus assumed be the correct one; for we reach the conclusion that it was not the intention of the legislature to authorize the appointment of persons who are not members of the municipal corporation, for whose use the means of local government were, in part, being provided.

The act is not carefully drawn. It is noticeable for the meagerness of its provisions, as well as the indefiniteness of some of those which are inserted. With this character, it is before us for construction. It is an act which relates alone

to the local government of the city of Birmingham. Its controlling purpose, as all must know, was to provide an efficient enforcement of the police powers of the city. To this end, the legislature knew and intended that the commissioners to be appointed should be persons familiar with the governmental affairs of the city and the needs and wants of its police system, and who should be identified with the city's interest. The commissioners are required to exercise full direction and control of the officers and members of the police force. They are required to hold meetings at all times when the public interest of the city may require. They are required to exercise constant supervision of the conduct of the police officers and to prefer accusations against them for wrongs and delinquencies committed by them which would justify their suspension or removal. These duties, which manifest themselves as the moving causes of the enactment, unmistakably imply necessity for the appointment of persons resident in the city and interested in its welfare, and their constant presence therein, without which their duties could not be well performed. Suppose the probate judge had appointed residents of the county of Mobile, for instance, to manage the police affairs of the city of Birmingham, would any one suppose, or could it be legitimately contended, that the legislature intended by this act to confer any such authority? The answer would at once be, No! that the intention was that citizens of the municipality, to be affected by the legislation, be selected to perform these duties. Suppose, again, the legislature should create an office for the exercise of some state governmental function, and provide that the person to fill it should be appointed by the governor, without providing that he should be a resident of the state, could it be contended that the governor was empowered <sup>76</sup> to appoint a resident of another state? and would the act be declared unconstitutional upon the assumption that, for that reason, it infringed local self-government? We apprehend it would be at once construed that the governor must appoint a resident of this state. Legislative enactments are always presumed to be of constitutional authority. It must clearly appear that they offend some provision of the constitution before the courts are authorized to set them aside. If a construction may be fairly indulged which will wrest them from the attack of giving offense to a constitutional limitation, that presumption shall be indulged. We are, therefore, of

the opinion that the failure of the act to provide in express terms that the commissioners shall be residents of the city is due to legislative oversight, which is supplied by the general intention of the legislature that they shall be such, manifest upon the face of the act itself.

It is again objected that the act is unconstitutional because, by its provisions, the terms of the present police officers are cut off, when that object is not expressed in the title. This contention may fairly raise the question whether, upon a proper construction of the act, the tenures of the present incumbents were cut off; but, whether so or not, the parties have joined in a request that we construe the act and announce our opinion upon that question.

It is a principle self-evident, as well as declared in all the authorities upon the subject, that legislative enactments, and each and every provision therein, go into immediate operation, unless by force of some general law, or provision contained in the act itself, the operation is postponed to some future period or event; and the special provision which would create such postponement must be stated in express words to that effect, or in terms so clear and certain as to admit of no other rational interpretation. The principle of this strictness results from the obvious necessity that all men should know with certainty when our laws take effect: *Lane v. Kolb*, 92 Ala. 636, and cases cited. Applying this rule to the act in question, and it cannot admit of doubt that the act went into effect at least as early as the day of the first regular meeting of the mayor and aldermen of Birmingham, in January, 1898—the time fixed in the act for <sup>77</sup> the appointment of the commissioners. There are no provisions which show, with the degree of certainty the rule requires, an intention to further postpone its operation. This is true, not only with respect to the act as a whole, but to each and every provision thereof. The result is that the power of the commissioners to appoint the police officers immediately arose, and all authority of the mayor and aldermen over their appointment and retention in office ceased. The persons in office being in by virtue of the appointive power of the mayor and aldermen, the abrogation or withdrawal of that power, and the substitution of a new appointive power in another body, necessarily, *ipso facto*, annulled the tenures of their appointees, there being nothing in the act retaining them in office: *Lane v. Kolb*, 92 Ala. 636; *State v. Board of Public Lands, etc.*, 7

Neb. 42. The rule is analogous to that which obtains in reference to agency. When the authority of an agent, who is empowered to appoint subagents, is revoked by the principal, the authority of all existing subagents, so appointed, is likewise revoked: *Mechem on Agency*, sec. 270. These principles are so undeniable that it is unnecessary to do more than state them. The conclusion here reached does not determine that the act is unconstitutional upon the ground alleged that the purpose to accomplish such a result is not clearly expressed in its title. The title is, "An act to establish a board of commissioners of police for the city of Birmingham, Alabama." This implies the insertion in the act of all powers reasonably necessary to an efficient administration of the police department of the city by commissioners, which obviously includes power in the commissioners to appoint police officers. Such power, as we have already shown, has the effect, in itself, of cutting off the terms of incumbents. It follows, logically, from these unassailable propositions, that the title of the act was sufficiently comprehensive in the particular in question: *Board of Revenue v. Barber*, 53 Ala. 589.

The next question arising is, What was the mayor's duty when McDonald presented himself for qualification? This record shows that it does not admit of serious question that the mayor had most ample notice and knowledge, official and personal, of McDonald's appointment. It was competent and necessary for the commissioners to organize for systematic work, by electing a presiding and <sup>78</sup> a clerical officer. They did so by electing a chairman and secretary. The act says they must appoint a "clerk." This they did by appointing a person charged with the duties of a clerk. That they designated him by the synonymous title of secretary is wholly immaterial. The duties of the officer were the same, whether you call him clerk or secretary, and the nature of those duties is clearly implied in either designation. The law regards the substance, not the forms, of things. The mayor of the city, as a principle of law, was bound to take official notice of the appointment of the commissioners and of the necessary officers of their board by them elected. He knew, therefore, that Mudd was chairman, and Boggan secretary or clerk. These officers duly certified to him McDonald's appointment. Besides, the proof is most abundant that the mayor personally knew all the facts, and made no pretense

that he did not, but based his refusal to act either upon the assumed unconstitutionality of the act or the mistaken conception that the tenures of those in office were not cut off. The trial of the title to the office was not within his jurisdiction. That must have been left to other tribunals. It was enough for him that McDonald presented a *prima facie* showing of his appointment emanating from the appointing power. This was done, and the oath of office should have been administered. There is clearly no merit in the suggestion that five days from McDonald's appointment had expired when he presented himself, for he had been reappointed within the five days. It is said there was no reappointment, but a ratification merely of the original appointment, which, upon the principles of the law of ratification, had relation to the time of the appointment ratified. This is a mistaken view. There is no such principle as the ratification by the appointing power of the prior appointment of a public officer. If a person has been informally appointed and has done official acts under it, or if he has acted without qualification, his acts are validated by law as those of an officer *de facto*, and no intent of ratification by the appointing power could add any thing to their validity. So, also, if a person duly appointed fails to qualify within the time prescribed by law, and thereby forfeits his right, a vacancy arises which the appointing power may fill. His failure to qualify cannot be "ratified." The appointing power can only fill the <sup>70</sup> vacancy. Though the action of the commissioners, in the present instance, was put in the form of a ratification, its necessary legal effect was that of a reappointment. It was a clear act of the commissioners manifesting that thenceforth McDonald should be chief of police, and this was duly certified to the corporate authorities. Nothing more was necessary to constitute an appointment.

The act required to be performed by the mayor was purely ministerial. There was no other adequate remedy to secure the right than mandamus. The city court properly granted the writ, and its judgment is affirmed.

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CONSTITUTIONAL LAW—DEPARTMENTS OF GOVERNMENT.—The legislative, executive, and judicial departments of the state government are distinct from each other, and so far as any direct control are concerned are independent of each other, but the power of either department is not absolute and may be incidentally affected by the action of another department: *Greenwood Cemetery etc. Co. v. Routt*, 17 Col. 156; 31 Am. St. Rep. 284.



**CONSTITUTIONS—INTERPRETATION OF.**—Words used in a constitution are to be construed with reference to the usage or custom of the country at the time of its adoption: *De Camp v. Archibald*, 50 Ohio St. 618; 40 Am. St. Rep. 692, and note. See the extended note to *Schuessler v. Dudley*, 60 Am. Rep. 123.

**OFFICERS, APPOINTMENT OF—POWER OF LEGISLATURE.**—The power of appointment to office is not essentially an executive function, it may therefore be regulated by law, and, if the law so provides, may be exercised by the members of the legislature: *People v. Freeman*, 80 Cal. 233; 13 Am. St. Rep. 122, and extended note; *State v. George*, 22 Or. 142; 29 Am. St. Rep. 586, and note.

**OFFICERS—REMOVAL OF.**—The legislature may remove public officers not only by abolishing the office but by an act declaring it vacant, and may lodge the power to remove from statutory offices in boards or other officers subject to statutory regulation: *Attorney General v. Jochim*, 99 Mich. 358; 41 Am. St. Rep. 606, and note; see, also, *Trimble v. People*, 19 Col. 187; 41 Am. St. Rep. 236, and note.

**MANDAMUS LIES TO COMPEL CONSTITUTIONAL EXECUTIVE OFFICERS** to perform the duties required of them by law: *State v. Houston*, 40 La. Ann. 393; 8 Am. St. Rep. 532.

**STATUTES—WHEN TAKE EFFECT.**—A statute takes effect from its date when no time is fixed and there is no constitutional provision concerning it: *Parkinson v. State*, 14 Md. 184; 74 Am. Dec. 522. Public acts of the general assembly take effect from its rising if not otherwise provided: *Perkins v. Perkins*, 7 Conn. 558; 18 Am. Dec. 120. A statute must be construed to speak from the first day of the session at which the act passed: *Weeks v. Weeks*, 5 Ired. Eq. 111; 47 Am. Dec. 358, and note.

## BELL v. OTTS.

[101 ALABAMA, 186.]

**JUDGMENT, ENTRY OF WHAT IS NOT.**—If a record shows that a jury has been sworn and impaneled, and that they find for the plaintiff for the lot sued for (describing it), and twenty-five dollars for detention, and adds "and judgment is rendered against the defendants for the land sued for, together with all costs in this behalf expended, for which execution may issue," this is not such an entry of judgment as will support an appeal.

*S. J. Darby and B. K. Collier*, for the appellants.

*Alex. T. London*, contra.

<sup>187</sup> HARALSON, J. The verdict in this case was, "We the jury find for the plaintiff for the land sued for [describing it], and twenty-five dollars damages for detention against defendant Martha Bell." On this verdict a judgment ought to have been entered against all the defendants for the land sued for, for twenty-five dollars against Martha Bell, as damages for detention, and against all of them for the costs: Code, secs.

2709, 2710; *Bishop v. Laloutte*, 67 Ala. 197. Immediately following this verdict, with a comma between, appears what purports to be a judgment in the cause, based on the verdict, namely: "And judgment is rendered against defendants Samuel Mace and Henry Edwards, for the <sup>188</sup> land sued for, together with all the costs in this behalf, for which execution may issue."

A judgment should be complete and certain in itself, and must appear to be the act, the adjudication of the court, and not a memorandum, or certified result: *Speed v. Cocke*, 57 Ala. 209. Among various definitions of a judgment in the books, not differing in legal effect from each other, we have the one that it is "the final consideration and determination of a court of competent jurisdiction, upon the matters submitted to it": 1 Freeman on Judgments, sec. 2; *Whitwell v. Emory*, 3 Mich. 84; 59 Am. Dec. 220. The language of a judgment is, "it is considered by the court that the plaintiff have and recover, or that the defendant go without day." If ever what purports to be a judgment falls short of being a finding, an adjudication of the court, complete and certain, but is in substance a mere memorandum of the clerk which declares, as here, no more than that a judgment was rendered, without setting out what the judgment was, it cannot be sustained as the final consideration and determination of the court: *Tombeckbee Bank v. Godbold*, 3 Stew. 240; 20 Am. Dec. 80; *Hinson v. Wall*, 20 Ala. 298.

There is here absolutely nothing in the shape of a judgment against the defendant Martha Bell, for any thing; and, as for the other defendants, there is simply a declaration that judgment is rendered against them for the land and costs, but no judgment is in fact rendered. This entry is lacking in form and material averments to constitute it a judgment, and to support it as such would be to sanction an uncertainty and looseness in the record and preservation of solemn and important judicial ascertainments, such as would be pernicious. Our conclusion is, there is no such judgment here as will support an appeal, and it is, therefore, dismissed.

Appeal dismissed.

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**JUDGMENTS.—ENTRY OF.**—A judgment is rendered when ordered by the court, but it is not entered until actually written in the judgment-book: *Durant v. Comegys*, 2 Idaho, 809; 35 Am. St. Rep. 267. A judgment is rendered at the time the court pronounces the decision: *Estate of Cook*, 77 Cal. 220; 11 Am. St. Rep. 267, and note.

## GREEN v. SNEED.

[101 ALABAMA, 205.]

**THE ALTERATION OF AN INSTRUMENT IN WRITING MAY CONSIST OF THE FILLING OF A BLANK THEREIN, WHICH THE PROMISEE WAS AUTHORIZED TO FILL IN A CERTAIN WAY, BY THE INSERTION THEREIN OF MATTER NOT INCLUDED IN THE AUTHORIZATION.**

**BLANKS IN INSTRUMENT, FILLING OF FOR TOO LARGE A SUM.**—If the promisee in an instrument is authorized to fill a blank therein by inserting the amount due him, but he inserts a larger sum, such instrument is void.

*Brown & Street*, for the appellant.

*Lusk & Bell*, contra.

206 McCLELLAN, J. The evidence is free from conflict that Sneed was authorized to fill the blank left in the mortgage executed by Green to him, by inserting therein the amount of the former's debt against the latter, after deducting therefrom the proceeds of certain two bales of cotton, and adding thereto the costs of a former suit between the parties. There is conflict in the testimony as to whether the mortgagee also had authority to add <sup>207</sup> to the debt and costs attorney's fees incurred by him in the former suit, and insert the aggregate of all these items in the blank space left in the instrument. For the purposes of this appeal, however, it will be conceded that the mortgagee was authorized to include and insert as a part of the amount intended to be secured, the sum paid his attorney for services in the previous litigation. A satisfying preponderance of the evidence fixes the amount of the debt balance at \$125. It was shown without conflict that the attorney's fee in question was \$18, and the costs of the former suit amounted to \$8.65. The total of these sums is \$151.65. The balance of the debt which the mortgagee claimed to be due was \$138.24. Adding to this the attorney's fee and court costs, the total is \$164.89. No phase or tendency of the evidence shows a greater total than this, and this sum, \$164.89, on the aspects of the testimony most favorable to the plaintiff, marks the extremest limit of the amount he was authorized to insert in the instrument. The amount actually inserted by or for him was \$167.10; \$2.21 in excess of his authority, if the evidence in his own behalf is to be taken as true, and \$15.45 in excess of the amount which, according to a preponderance of the testimony, he was authorized to insert in the blank.

The general proposition that any material alteration of an instrument after its execution, without the maker's consent, avoids it and discharges him from all obligation depending upon it is not controverted in this case: *Montgomery v. Cross-thwait*, 90 Ala. 553; 24 Am. St. Rep. 832; *Anderson v. Bel-lenger*, 87 Ala. 334; 13 Am. St. Rep. 46. Nor can it be doubted in principle or upon authority that a material and, as between the original parties to the instrument, vitiating alteration may consist in the filling of a blank, which the promisee is authorized to fill in a certain way, by the insertion therein of matter not covered by the authorization: 1 Am. & Eng. Ency. of Law, 518; *Toomer v. Rutland*, 57 Ala. 379; 29 Am. Rep. 722. And as any change of the amount intended to be evidenced by a writing, whereby it becomes nominally a promise to pay either a greater or less sum than that originally expressed, is a material, and, therefore, vitiating alteration (1 Am. & Eng. Ency. of Law, 503), so, in principle, <sup>208</sup> where the amount is left blank and the promisee is authorized to insert a given sum, or the true aggregate of several specified items, the respective amounts of which are fixed but not at the time known to the parties, and he inserts a different amount, as here, in excess of the true aggregate of all the items intended to be embraced, the like vitiating consequences must ensue.

The court below confined the application of these principles to cases in which the alteration is made with a fraudulent intent, and, finding no such intent to have actuated the plaintiff in this instance, held that the mortgage was a valid security for the amount really due, notwithstanding a different and excessive amount had been inserted in it. The distinction is not well taken. The question of intent is not involved. As is well said by counsel: "The motive with which the change is made, or the unauthorized filling of the blank is done, is not material. It is not because the thing done is actual fraud, but because a contrary rule would open too great a door for fraud," and because, we may add, that the alteration changes the legal identity of the paper and causes it to speak a language differing in legal effect from that which it originally spoke, a result which would ensue however pure the intent with which the alteration was made, that the law holds the instrument, as between the original parties and those nominally acquiring rights under it with notice of the alteration, to be null and void for all purposes:

1 Am. & Eng. Ency. of Law, 518, 520; *Glover v. Robbins*, 49 Ala. 219; 20 Am. Rep. 272; *Toomer v. Rutland*, 57 Ala. 379; 29 Am. Rep. 722; *Montgomery v. Crossthwait*, 90 Ala. 573; 24 Am. St. Rep. 832.

Where the alteration or unauthorized filling of blanks is free from all covinous intents, the result of an honest mistake or miscalculation, it may be that the promisee can recover on the original consideration: he certainly could not do even this if he made or consented to the change for any fraudulent purpose: 1 Am. & Eng. Ency. of Law, 526; *White v. Hass*, 32 Ala. 430; 70 Am. Dec. 548; but here the action is not on the original consideration for which the mortgage was executed, but the right of recovery, the title asserted by the plaintiff in this action of detinue, depends upon the vailidity of the paper itself, which in legal contemplation ceased to be the instrument which the defendant executed the moment it was ~~was~~ altered as shown by the uncontroverted evidence, and its emasculation is none the less complete because of the absence of evil intent on the part of the plaintiff in committing the act which destroyed it.

The evidence not only authorized the jury to find for the defendant, but it showed, without conflict or room for adverse interference, that the muniment of title upon which the plaintiff relied for recovery was utterly infirm and invalid, and hence the jury could not have found other than they did under the law of the case.

It is clear that the trial court erred in setting aside the verdict and granting a new trial. The judgment to that effect is reversed and annulled, the motion for new trial is overruled and denied, and the verdict and judgment for defendant as returned and rendered in the court below is left in full force.

Reversed and rendered. —

**ALTERATION OF INSTRUMENTS BY FILLING BLANKS** contrary to the intention of the parties: See the extended notes to *Woodworth v. Bank*, 10 Am. Dec. 271, and *Stuhl v. Berger*, 13 Am. Dec. 669.

**FILLING BLANKS.—WHEN AVOIDS INSTRUMENT:** See the extended note to *Bedell v. Herring*, 11 Am. St. Rep. 316, and the notes to *Fordyce v. Kominaki*, 4 Am. St. Rep. 26, and *Rainbolt v. Eddy*, 11 Am. Rep. 153.

## STROUSE v. LEIPP.

[101 ALABAMA, 433.]

**HUSBAND AND WIFE, JOINDER OF.**—In an action to recover damages resulting from the negligence or other tort of a wife it was, at the common law, necessary to join her husband.

**HUSBAND AND WIFE, JOINDER OF IN ACTIONS FOR HER TORTS.**—Under a statute exonerating a husband from liability for the torts of his wife in which he does not participate, and declaring that she shall be suable therefor as if she were sole, it is not proper to join her husband with her in an action for tort committed by her alone.

**PLEADINGS AND PRACTICE.**—Pleas in abatement and in bar cannot be pleaded together.

**PLEADING AND PRACTICE—HARMLESS ERROR.**—If a demurrer is sustained to a special plea, but the defendant interposes the general issue under which he is entitled to and does interpose the defense specially pleaded, the sustaining of such demurrer, whether erroneous or not, cannot be prejudicial.

**THE OWNER OR KEEPER OF A DOMESTIC ANIMAL WHICH IS VICIOUS AND PRONE OR ACCUSTOMED TO DO VIOLENCE,** having knowledge of its disposition and habits, must, at his peril, keep it safely and securely, so that it cannot inflict injury, and cannot relieve himself from liability by proving that it escaped without any special negligence on his part.

**HUSBAND AND WIFE.**—A WIFE IS BOUND TO FOLLOW HER HUSBAND when he changes his residence, even without her consent, providing the change is made by him in the *bona fide* exercise of his power, as head of the family, of determining what is best for it.

**HUSBAND AND WIFE.**—A WRONG COMMITTED BY A WIFE in the presence of her husband is presumed to be his act.

**HUSBAND AND WIFE—LIABILITY OF THE LATTER FOR TORTS.**—If a statute declares that a husband is not liable for the torts of his wife in which he does not participate, and that she is answerable therefor, it does not enlarge her liability, but merely transfers the burden from the joint shoulders of both and places it on the wife alone.

**HUSBAND AND WIFE—LIABILITY OF THE LATTER FOR THE ACT OF VICIOUS ANIMALS.**—If a vicious dog is kept on premises occupied by a husband and wife, though both the premises and the animal are owned by her, still the keeping of the dog is a matter over which he is authorized to exercise control as the head of the family, and, if it escapes and injures a third person, the husband alone is answerable, notwithstanding a statute declaring that he shall not be liable for any torts of his wife in which he does not participate, and that she shall be suable therefor.

**HUSBAND AND WIFE.**—A STATUTE SECURING TO MARRIED WOMEN THEIR SEPARATE ESTATES does not deprive the husband of his power and authority as head of the family, nor render him any the less accountable for the economy and administration of the household. Therefore, if the family occupies premises which are the separate estate of the wife, and a vicious dog is kept thereon belonging to her, the husband, and not she, is answerable for the injuries resulting from the escape of such dog, and his attacking a third person on a highway adjacent to the premises.

ACTION by Elizabeth Leiff against Estra Strouse, a married woman, to recover compensation for injuries suffered by the former from a ferocious dog alleged to belong to the latter. The defendant was a married woman, wife of Simon Strouse, and lived with him on premises in the city of Mobile, the title of which was vested in her. The plaintiff lived next door to the defendant on premises divided from those of the defendant by a fence only. Along the rear of both fences ran a common public alleyway, into which a gate opened from the rear of the defendant's yard. The plaintiff, while in this alleyway, was attacked by the dog, which rushed out of the alleyway, and severe injuries were inflicted. Defendant and her husband were absent from home at the time. The defendant asked the court for charges marked "6 and 7," the first of which was that the jury be charged "that if they believed from the evidence that the defendant Estra Strouse and Simon Strouse are husband and wife, and resided together as such husband and wife at the time the plaintiff was injured by the dog, and that the dog was kept on the premises where they resided, then the husband was the keeper of the dog, and they must find for the defendant," and the jury, "if they believe from the evidence that the defendant was at the time of plaintiff's injury a married woman, residing with her husband, Simon Strouse, on the premises where the dog was kept, then in law the husband was the keeper of the dog, and they must find for the defendant." The court refused to so instruct the jury, and a verdict was returned for the plaintiff, assessing her damages at two thousand five hundred dollars. Thereafter defendant appealed.

*Overall, Bestor & Gray, for the appellant.*

*Gregory L. & H. T. Smith, contra.*

426 STONE, C. J. This suit was brought by appellee to recover damages for alleged injuries suffered from the bite of a dog. The suit is against Estra Strouse, and the complaint charges that "the defendant kept, and for a long time prior thereto had kept, a dog of savage and ferocious nature, and on, to wit, the 21st day of February, 1891, the defendant so negligently kept said dog that it escaped from the premises and attacked the plaintiff, and bit and tore and lacerated her, to her damage in the sum of. . . . The plain-

tiff avers that the defendant had notice of the savage and ferocious nature of said dog prior to the matters hereinbefore complained." The complaint then claims special damages for being thereby disabled to perform customary work, for expense of medical treatment, and for necessary nursing. There is a claim of a specified sum as damages, sufficiently large to cover the recovery.

The defendant interposed a plea, sworn to, which is styled a plea in abatement. This plea was demurred to, the demurrer sustained, and this ruling is the subject of one of the errors assigned. The plea avers that when the act was done which gave rise to the suit "she was a married woman, the wife of Simon Strouse, who is now living in the city and county of Mobile, state of Alabama, that she was not at said time separated, or living apart from her said husband, but they were living together in conjugal and marital relations." This clause of the plea does not negative the idea that the act complained of was solely the act of the wife. At common law this would have been a good ground of abatement. Under that system a suit could not have been maintained against the wife alone, on the facts charged in the complaint in this <sup>427</sup> case. It would have been necessary to sue the husband jointly with the wife: *Pinkston v. Greene*, 9 Ala. 19.

Our statute has changed the common law on this subject. Section 2345 of the code declares that the husband is not liable for the torts of the wife, "in the commission of which he does not participate; but the wife is liable . . . for her torts, and is suable therefor as if she were sole." This has changed the entire law as to the manner of suing a married woman, and has rendered it improper to join the husband, when the charge is that the wife herself committed the tort: 14 Am. & Eng. Ency. of Law, 647, and note 1 on 648, 649. The effect of our statute has been to render, in large degree, if not entirely, the matter set up in the first part of this plea nonavailing as a defense in abatement. Its whole scope, if available in any conditions, would seem to be confined to its effect as a bar to the action.

This plea has another averment, namely, "that the said husband was at said time, prior thereto, and ever since, the head of the family and the household, and had control of the said dog and of the premises where the said dog was kept, and where said occurrence is said to have taken place." This averment is, in no sense, matter in abatement. If true,



it is equivalent to the general issue, is a denial that the defendant kept the dog, and is a perfect bar to the action, if made good. Pleas in abatement, and pleas in bar cannot be pleaded together; and it may be that the latter averment would be construed as a waiver of the matter relied on in abatement. But we need not decide this. Defendant interposed the plea of the general issue, and under that plea was not only entitled to make all defense she could have made under the plea to which the demurrer was sustained, but she actually introduced proof, and had the jury pass on the identical question she had sought to present by the special plea. This, under all the authorities, cured the error, if any had been committed, in sustaining the demurrer to the latter clause of the special plea.

The doctrine is well settled that the owner or keeper of a domestic animal which is vicious and prone or accustomed to do violence, having knowledge of such violent disposition or habit, must safely and securely keep such animal so that it cannot inflict injury. Whether or not there was special negligence in permitting the dog's escape <sup>438</sup> from the premises is not the inquiry. The keeper must at his peril safely keep such animal. Such is the condition on which the ownership or custody of known vicious animals is tolerated. Ownership or custody of such vicious animal is not one of the natural, inherent rights of property. It is a qualified or restricted right. Qualified by the condition that the animal can be and is safely confined and kept: Cooley on Torts, 343, et seq; 1 Addison on Torts, sec. 261; Whittaker's Smith on Negligence, 99; 2 Shearman and Redfield on Negligence, secs. 628, 631; *The Lord Derby*, 17 Fed. Rep. 265; 1 Am. & Eng. Ency. of Law, 581; *Garlick v. Dorsey*, 48 Ala. 222; *Nolan v. Traber*, 49 Md. 460; 33 Am. Rep. 277.

Previous knowledge of the animal's vicious habits must be alleged and proved; but positive proof is not always necessary. It may be inferred from circumstances. But the knowledge of the vicious habits of an animal need not refer to circumstances of exactly the same kind. All that the law requires to make the owner or keeper liable is knowledge of facts from which he can infer that the animal is likely to commit an act of the kind complained of: 1 Am. & Eng. Ency. of Law, 582, and note.

The pivotal question in this case is, whether Mrs. Strouse, the wife of Simon Strouse, living in the same house and in

marital relations with him, can, under the facts of this case, be adjudged guilty of the tort complained of. Let us first ascertain precisely what was done which led to the plaintiff's alleged injury, or sheds light on the circumstances attending it. We premise that what is here stated is proved by all the testimony bearing on the question or questions, without a shade or semblance of conflict. The house and premises in which Mr. and Mrs. Strouse lived together as husband and wife was the property of Mrs. Ezra Strouse, the defendant in this suit. They lived there as husband and wife, having their children around them, and had lived at the same place for many years. A dog had for years been on the premises, not otherwise confined than by the inclosure of the lot. In the daytime, when neither Mrs. Strouse nor her husband was at home, the dog escaped through the back gate of the lot, and inflicted the injury complained of in an open, public alleyway which extended across from street to street at the rear of the <sup>439</sup> premises. No special act of negligence, in fact, no direct agency, is charged either against Simon or Ezra Strouse, in immediate connection with the escape of the dog at the time it took place. The immediate cause, according to the testimony, was the act of a visiting stranger. But, as we have shown above, negligence in permitting the dog to escape from the inclosure was not essential to the maintenance of this action. The fault and liability for the injury which ensues are established, according to legal requirements, when it is shown that a vicious animal, prone, and known to be prone, to inflict personal injuries, is kept, and such animal escapes from confinement and inflicts injury. This constitutes an actionable tort, perpetrated by the keeper of such animal. That there was testimony tending to prove the vicious, if not dangerous, nature and temper of the dog, and tending to charge his keeper with a knowledge of such, his evil disposition cannot be gainsaid. A verdict, finding such to be the fact, could not be set aside as unsupported by testimony.

The testimony as to the ownership, custody, or keep of the dog was as follows: Plaintiff testified: "It was Mrs. Strouse's dog. She would go to the butcher-wagon and ask for meat for the dog. She got the dog from Mr. Hayes, who is now dead. I heard Mrs. Strouse say that Mr. Hayes gave her the dog when it was a small puppy. Mr. Strouse's cook fed the dog. I do not know who took care of him." This was

the entire testimony for plaintiff on this question. For defendant, Strouse and his wife testified that Hayes or Haas gave the puppy to Mr. Strouse, that he had always owned him, and gave directions as to his being fed. Their two children and the cook confirmed them in this testimony. It is not our intention to compare the relative weight of this conflicting testimony.

The authorities are uniform that the husband is the head of the family so long as the marital relation is maintained. He determines where the home shall be, is entitled to the wife's labor and services, has the right to have her society, controls the home and the household, and, with limited exceptions, she must obey his commands. In domestic management she is not presumed to have an independent will of her own. And our statutes securing to married women their separate estates have <sup>440</sup> wrought no change in these relative rights and duties that affects the questions presented in this case. In *Hanberry v. Hanberry*, 29 Ala. 719, it was said: "It is settled law that the domicile of the wife follows that of the husband." In *Firebrace v. Firebrace*, L. R. 4 P. D. 63, 67, it is said: "The domicile of the wife is that of the husband." This was said in 1878, after the enactment of the Married Woman's Act in England. In the matter of *Cochrane*, 8 Dowl. Pr. 630, 635, Coleridge, J., replying to the contention "that the wife, as to her residence and manner of passing her time, was independent of her husband," said: "But our law has not so limited his rights nor rested them on so narrow a foundation. Although expressed in terms simple almost to rudeness, the principle on which it proceeds is broad and comprehensive. It has respect to the terms of the marriage contract and the infirmity of the sex. For the happiness and honor of both parties it places the wife under the guardianship of the husband, and entitles him, for the sake of both, to protect her from the danger of unrestrained intercourse with the world, by enforcing cohabitation and a common residence." In the same opinion he quoted Lord Mansfield as saying, "The husband has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he finds her."

In *Ashbaugh v. Ashbaugh*, 17 Ill. 476, the court said: "In contemplation of law the husband and wife are one person, and her residence follows that of the husband." This prin-

ciple was reaffirmed in *Davis v. Davis*, 30 Ill. 180, and in *Kennedy v. Kennedy*, 87 Ill. 250. In *Elijah v. Taylor*, 37 Ill. 247—a case controlled by their statute securing to married women the ownership of their property—the court employed this language: “We desire to proceed cautiously in the construction of that act because, although passed without much consideration, it involves interests of great magnitude and questions of no little difficulty. All that we deem it necessary to say, in regard to the case before us, is this, that where the husband, as the head of the family, occupies and cultivates the land of the wife, he must be considered as occupying it with her consent for the common benefit of the family; and the products of his toil upon such land are as much <sup>441</sup> his property, notwithstanding the act of 1861, as if he had occupied as a tenant land rented from some third person. Any other rule would plainly lead to great confusion and open a wide door to fraud.”

In *Boyce v. Boyce*, 23 N. J. Eq. 337, 348, the principle is thus expressed: “The wife is bound to follow her husband when he changes his residence, even without her consent, provided the change is made by him in the *bona fide* exercise of his power, as head of the family, of determining what is the best for it.”

In California the rights of the wife to the ownership and control of her property were never framed after the common-law model. They partook more of the civil-law system. In *Hardenbergh v. Hardenbergh*, 14 Cal. 654, is this language: “The husband, being the head of the family, and bound for its support and maintenance, may change the matrimonial domicile at pleasure, and it is the duty of the wife to submit to the reasonable exercise of this right.”

The case of *Glover v. Alcott*, 11 Mich. 470, arose after the enactment of their statute securing to married women the ownership and control of their property. The wife had permitted the husband to conduct a large business, styling himself “W. W. Alcott, agent.” Indebtedness was incurred in the conduct of the business, and some barrels of flour, the product of the enterprise, were seized and sold in payment thereof. The wife brought an action of trover for their conversion. In discussing the question of her right to maintain the action the court, Christiancy, J., said: “We see nothing in the statute to satisfy us that the legislature contemplated so radical a change in the legal relations of husband and

wife, while they continue to live together, and he is competent to the transaction of business, and guilty of no gross neglect of his duties to her and his family. But the husband must, as a general rule, still be regarded as the head of the family, and as the only one of the two authorized to carry on such general trade and business."

In Massachusetts, they have legislation somewhat analogous to ours, relating to the rights of married women in their separate property. In *Commonwealth v. Wood*, 97 Mass. 225, the husband was indicted for keeping a house of ill-fame. The house was the separate property of the wife. The defense relied on and ruled upon is shown in <sup>443</sup> the following extract from the opinion of the court: "The defendant contends that he is not liable, because the house was owned by his wife as her separate property, and the business of keeping a house of ill-fame therein, which was resorted to for prostitution and lewdness, was carried on by her, and she took the profits thereof, and he did not participate in them. Whether he is liable in such a case must depend upon the relations which he sustains to the household, while he lived with his wife as her husband.

"The doctrine of the common law is that by marriage the husband and wife become one person in law; that she is under his protection, influence, power, and authority, and that he is the head of the household. This condition of the wife is designated by the expressive term 'coverture.' One effect of it is, as a general rule, though subject to many exceptions, to excuse her from punishment for many crimes committed by her in the presence of her husband, on the ground that she acted under his compulsion. He alone is held responsible for such crimes. [Citing many authorities.] How far he may exercise force in restraining her is not precisely settled. But there can be no doubt that he may exercise as much power as may be reasonably necessary to prevent her, as well as other inmates of the house, from making it a brothel. It is said in Dalton's Justice that he is liable if she keep an ale-house without license against his will.

"But it is contended that the recent legislation of this commonwealth has made married women so far independent of their husbands as to release the defendant, in such a case as the present, from all responsibility for the conduct of his wife. It is true that the house they lived in appears to have been owned by her to her sole and separate use, free from the con-

trol of her husband. But, ever since the law of equitable trusts existed, married women have been able to hold property thus independently of the husband's control; and the fact that the family lived in a house they owned has never been regarded as affecting the rights and power of the husband, as head of the family. . . . These provisions of the statute relate to legitimate business, and not to the keeping of brothels. They do not take away his power to regulate his household, so far as to prevent his wife from committing this offense, or relieve him from responsibility <sup>443</sup> if it is committed": See, also, *Commonwealth v. Flaherty*, 140 Mass. 454.

A misdemeanor or tort committed by a married woman, conjointly with or in presence of her husband, is presumed to be his act, because the law raises the presumption that she acts in obedience to his will, or under his coercion. The same rule applies as to crimes, except a few of the higher grades: *Douge v. Pearce*, 13 Ala. 127; *Williamson v. State*, 16 Ala. 431; *Lawson v. Lay*, 24 Ala. 184; *Mulvey v. State*, 43 Ala. 316; 94 Am. Dec. 684: *Quinlan v. People*, 6 Park. C. C. 9; Cooley on Torts, 115. "There is a presumption," says Judge Cooley, "corresponding to that which is made in the criminal law, that, if a wrong is committed by the wife in the presence of the husband, it must have been committed by his consent and under his influence, and, consequently, is his wrong rather than that of the wife, and should be redressed in a suit against him alone. But any such presumption is liable to be overthrown by evidence": See, also, *Carleton v. Haywood*, 49 N. H. 314.

This same learned author, Judge Cooley, page 118, says: "It is not very clear how far the law of torts has been modified." He was speaking of the influence exerted by the statutes by which married women have been given independent power to make contracts and to control property. Continuing, he says: "We should probably be safe in saying that so far as they give validity to a married woman's contracts, they put her on the same footing with other persons, and when a failure to perform a duty under a contract is in itself a tort, it may doubtless be treated as such in a suit against a married woman. The same would probably be true of any breach of duty imposed upon a married woman as owner of property which she possesses and controls the same as if sole and unmarried."

We have referred to our statute which authorizes suits to be brought against the wife alone: Code of 1886, sec. 2345. That section in its entirety reads as follows: "The husband is not liable for the debts or engagements of the wife, contracted or entered into after the marriage, or for her torts, in the commission of which he does not participate; but the wife is liable for such debts or engagements entered into with the consent of her husband in writing, or for her torts, and is suable therefor, as if she were sole."

444 All who are familiar with the principles of the common law will readily perceive and take in a large field for the operation of this statute. Under that system a wife could make no contract or agreement, which, as such, would authorize an action and recovery against her. Under the statute, if she enter into a contract or agreement with the written consent of her husband an act for its breach may be maintained against her alone. Nor could she be sued alone under common-law rules, for any tort committed by her, no matter how wrongful, violent, or independent of presumed marital restraint her conduct may have been. Under that system, if the tort was committed in the presence of her husband, *prima facie*, it was not her tort, but was presumed to have been the work of her husband's coercion. For such act, unless it was affirmatively shown that she acted independently of her husband's will, she could not be sued, even conjointly with her husband. It was his tort and his alone and he alone was suable for it. If she committed a tort in the absence of her husband, or, if present, if it was affirmatively shown that she acted of her own will and independently of his then she could be sued, but the suit could only be maintained against her and her husband jointly. In this last class of cases the statute has changed the law to this extent: It is now neither proper nor permissible to join the husband as a defendant in an action for a tort committed by a married woman, "in the commission of which the husband does not participate." That is in those cases of tort by the wife in which, at common law, the husband and wife could be jointly sued, the wife under the statute may and must now be sued alone. There was no intention to change the domestic relations between husband and wife, or to revolutionize the economy which pertains to that domestic relation. The statute relates to remedies. It confers a remedy for the enforcement or breach of a contract or agreement, which

itself had authorized a married woman to enter into; and a new remedy for an actionable tort committed by her. For either of these she must be sued alone. There is not a word or syllable in the statute which gives intimation of an intention to declare and fasten an enlarged liability for torts. It compasses all its ends and gives effect to its every provision, when it transfers the burden from the joint <sup>445</sup> shoulders of husband and wife and places it on the wife alone. We repeat, so far as it relates to torts, it deals with the remedy, not the liability. We do not doubt that a married woman may commit a tort, even in the presence of her husband, for which an action may be maintained against her individually and separately. Personal violence or any other active wrong showing that it was prompted by her personal will, passion, wantonness, or recklessness, would fall within this class. Proof of such self-prompted action would overcome the presumption of marital restraint or coercion: *Carleton v. Haywood*, 49 N. H. 314.

Let us recur to the facts of this case. The dog had been on the premises for several years. No present act of negligence is charged against husband or wife which led to the escape of the dog, and consequent injury of the plaintiff. The fault charged was and is, that a dog with known vicious propensity was kept on the premises, and that escaping therefrom he inflicted the injury complained of. The wrongful act was the keeping of the dog. This pertained to the government of the household and premises, the economy and administration of the domestic affairs. It was not the act of a moment, or the work of an hour or a day. It was continuous in its nature, and must be charged to the account of the head, the governing head, of the family. For this injury no suit could have been maintained at common law against the husband and wife jointly. It would have been adjudged to be his act, his wife at most acting conjointly with him, and under his presumed control. Nor has the statute wrought any change in this bearing of the question. If the wife had any part or lot in the keep of the dog it cannot be classed as her tort, "in the commission of which he did not participate." She could not keep the dog without his consent and participation. Hence the case is not brought within the provisions of the statute.

A further argument. Let us suppose the husband had been sued, and he had pleaded in bar that the wife owned



and kept the dog. Every one will say such defense would be frivolous. The husband, the head and governor of the family, must be held accountable for the economy and administration of the household. This power and right have not been taken away or impaired <sup>446</sup> by the statutes securing to married women their separate estates.

We are aware that we have given to this subject a somewhat extended consideration. We have done so because it brings before us, for the first time, the inquiry, to what extent, if any, our married woman's laws have changed the relations of the husband to the household and its government. We have felt that so grave a question should not be slurred over, but should be clearly and definitely settled. And notwithstanding our statutes have revolutionized the property rights of the wife, they have effected no change in the headship, the dominion and control of the husband over the household, or in the government of the home and its appurtenants.

Charges 6 and 7, asked by defendant, are in strict accord with the principles we have declared, and each of them should have been given. We need not consider any other rulings.

Reversed and remanded.

MCCLELLAN, J., dissented.

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**HUSBAND AND WIFE—JOINDER OF HUSBAND IN ACTION FOR WIFE'S TORTS.** A husband is liable for the torts of his wife committed by her alone and not in his presence, and when in such case she is sued the husband must be joined: *Flesh v. Lindsay*, 115 Mo. 1; 37 Am. St. Rep. 374, and note.

**HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR TORTS OF WIFE COMMITTED IN HIS PRESENCE.**—For the torts of married woman committed in the presence of her husband he is *prima facie* alone responsible: *Brazil v. Moran*, 8 Minn. 236; 83 Am. Dec. 772, and extended note; *McKeown v. Johnson*, 1 McCord, 578; 10 Am. Dec. 698. If the wrongful act of a wife is committed in the presence of her husband, and by his direction, he alone is liable: *Flesh v. Lindsay*, 115 Mo. 1; 37 Am. St. Rep. 374, and note. See, also, the extended note to *Commonwealth v. Neal*, 6 Am. Dec. 106.

**HUSBAND AND WIFE—CHANGE OF DOMICILE.**—A wife must accompany her husband when he changes his place of residence: *Guido v. Guido*, 14 Cal. 506; 76 Am. Dec. 440.

**ANIMALS—LIABILITY OF OWNER OF FOR INJURY CAUSED BY VICIOUS HABITS.**—An owner of premises who, having knowledge of the vicious and dangerous habits of a dog owned by his agent, permits such dog to run at large, is liable for any damage done by the dog to a passerby: *Harris v. Fisher*, 115 N. C. 318; 44 Am. St. Rep. 452, and note. See, also, the note to *Knowles v. Mulder*, 16 Am. St. Rep. 631.

**PLEADING.**—A plea in abatement is waived by a plea in bar: *Gains v. Park*, 3 B. Mon. 223; 38 Am. Dec. 185.

## CREED v. SUN FIRE OFFICE.

[101 ALABAMA, 522.]

**INSURANCE—AGENT'S FRAUD IN WRITING ANSWERS INCORRECTLY.**—If application for insurance is made to an agent authorized to issue policies of fire insurance to whom the applicant fully and truly stated his interest in the property, and the agent, being fully informed, drew up the application, received the premium, and turned over the policy to the applicant, it cannot be avoided on the ground that he was not the unconditional and sole owner of the property, and that his interest therein was not correctly stated in his application, though the policy contains a condition that it shall be void if the interest of the assured is other than the unconditional and sole ownership of the property insured.

**INSURANCE—INSURABLE INTEREST.**—A creditor has an insurable interest in a building on property of the estate of his deceased debtor, and which may be subjected to the payment of his debt, the personal property of the estate being insufficient for that purpose.

**INSURANCE—PLEADING SHOWING INTEREST OF THE INSURED.**—If, in an action upon a policy of insurance against loss by fire, it is alleged that one of the plaintiffs has an interest in the property as widow of the deceased, and that the other had a claim against his estate, to pay which there is no property except that insured, the insurable interest of such plaintiffs sufficiently appears.

*A. A. Wiley*, for the appellants.

528 **COLEMAN, J.** This is an action by appellants upon a policy of insurance issued for the benefit of plaintiffs, insuring a certain dwelling against loss or destruction by fire. The suit is in the joint name of Katie Creed and Mattie Flinn, the assured. The defendant pleaded several special pleas, upon some of which issue was joined, and to the others a replication was filed by plaintiffs. The court sustained a demurrer to the replication, and, the plaintiffs declining to plead further, judgment was rendered for the defendant.

Several questions have been argued, but the rulings of the court upon the demurrers to the replication present the material questions involved on this appeal. The first is, whether, when a policy of fire insurance contains a stipulation that the policy shall be void if the interest of the insured be other than "the unconditional and sole ownership of the property insured," and the plea avers a state of facts which, if true, shows that the interest of the insured was not truly stated in the policy, and that the interest of the insured was not that of "unconditional and sole ownership," a replication to such plea is good which avers that the policy was procured from an agent of the defendant, authorized to issue policies of fire insurance, to whom the insured, at the time the policy

was applied for and received, truly and fully stated their interest in the property to the agent, and that the agent, being fully informed, himself drew up the application for the insurance, received the <sup>520</sup> premium therefor, and, with full knowledge of the facts, turned the policy over to plaintiffs. We have held that if the applicant make full and true answers to the questions contained in the application, and suppresses no material fact which it is his duty to make known, the company will not be permitted to take advantage of the carelessness, inadvertence, or misunderstanding of its agent, the insured being without fault: *Alabama Gold Life Ins. Co. v. Garner*, 77 Ala. 210; *Williamson v. New Orleans Ins. Assn.*, 84 Ala. 106; *Pelican Ins. Co. v. Smith*, 92 Ala. 428; *Equitable Fire Ins. Co. v. Alexander* (Miss., Nov. 22, 1892), 12 South. Rep. 25. Upon the same principle, and for stronger reasons, the company cannot avoid its obligation if its own agent knowingly and intentionally writes down the answers differently from those made by the insured. We think the replication a full answer to the plea on this question.

The next proposition involves a question new in this state. Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor, which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien, either statutory or contract, without a *jus in re* or *jus ad rem*, owning a mere personal claim against his debtor, has not an interest in the property of his debtor. Such contracts are void as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt and which, if destroyed, will result in the loss of the debt. The real estate as well as the personal property of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor the debt is no longer enforceable *in personam*. The proceedings to reach the property of the estate of the deceased debtor are *in rem*. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. Whoever knowingly receives the property of a deceased debtor and wrongfully converts it is answerable to

the creditor: 8 Brickell's Digest, sec. 148, p. 464; sec. 162, p. 465.

The relation of creditor and debtor invests the creditor <sup>530</sup> with an insurable interest in the life of his debtor to the extent of his debt: *Alexander v. Sanders*, 93 Ala. 345; 11 Am. & Eng. Ency. of Law, 819. It would seem upon like principles that, when the property becomes directly subject to proceedings *in rem* for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and if it be true that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee, nor such lien as the statute may confer on an attaching or execution creditor, but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. In the case of *Herkimer v. Rice*, 27 N. Y. 163, the question arose as to whether an administration of an insolvent estate held an insurable interest in the real estate of the deceased debtor. The court (Denio, C. J., rendering the opinion) held that he did, and the conclusion was based in great part upon the proposition, that the creditors had such an interest, which the administrator could protect by insurance for them. We think whatever could be done by an administrator for the creditor in this respect could be done directly by the creditor for himself: *Rohrbach v. German Fire Ins. Co.*, 62 N. Y. 47; 20 Am. Rep. 451. Other reasons might be given, but we are of the opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficient to pay the debts, has an insurable interest in the property of the estate, which by law may be subjected by proceedings *in rem* to the payment of the debts. The recovery cannot exceed the amount of the insurable interest.

The next question is, whether the pleadings show such an insurable interest. The pleas and the replication appear to have been drawn with technical caution, so far as the rights

of Mattie Flinn, the creditor, are <sup>531</sup> affected. The plea shows that the building and lot, upon which it is located, belonged to the estate of Thomas Creed, deceased, and that neither of the assured are his legal heirs. Upon the death of Thomas Creed the land descended to his legal heirs. *Prima facie*, upon the facts of the plea, the insured owned no insurable interest. The replication avers that Katie Creed was the widow of Thomas Creed, and that he owned no other real estate, and this statement of facts is followed with the conclusion, that she owned a dower and homestead interest. Hers was clearly an insurable interest. Its value is a fact to be ascertained by proof. The replication then further averred that Mattie Flinn was a creditor of Thomas Creed, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to his estate. The interest shown by the plea to be in Katie Creed (dower and homestead) does not include the entire estate. Under the replication there is a remainder interest in the real estate, liable for the debts of the estate. The pleadings inform us that the lot and building were in the city of Montgomery. Whether it exceeded in value two thousand dollars, the constitutional limit of the value of the homestead exempt from debts during the lifetime of the widow, does not appear. We are not unmindful of the statutory provision by which under some circumstances the fee to the homestead may become vested in the widow and minor children or widow or minor child. The consideration of these questions does not rise upon the pleadings. The court erred in sustaining the demurrer to the replication. The proportionate interest of the insured is a matter of adjustment between themselves if both are entitled to recover.

Reversed and remanded.

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**INSURANCE—LIABILITY OF COMPANY FOR FALSE ANSWERS OF AGENT.—**  
If the agent of an insurance company makes or fills in false answers in an application for insurance, without the knowledge or consent of the insured, the company cannot avoid payment of a loss on account thereof: *Kansas etc. Ins. Co. v. Saindon*, 52 Kan. 486; 39 Am. St. Rep. 356. When the local agent of an insurance company has actual knowledge of the falsity of an answer to a question in the application for insurance which he writes for the insured, the knowledge of the agent will be imputed to the company, and it will not be allowed to avoid the policy on the ground of a false warranty in relation to such answer: *Follette v. Mutual Acc. Assn.*, 110 N. C. 377; 28 Am. St. Rep. 693, and note.

**SOUTHERN BUILDING AND LOAN ASSOCIATION v.  
ANNISTON LOAN AND TRUST COMPANY.**

[101 ALABAMA, 582.]

**BUILDING AND LOAN ASSOCIATIONS—FORFEITED STOCK OF BORROWER, WHETHER MUST BE APPLIED TOWARD THE SATISFACTION OF HIS DEBT.**—If a loan is made to a member of a building and loan association for the payment of which he pledges his stock therein, and, by reason of his subsequent default in payment of his dues, his stock becomes forfeited, he is not entitled to be credited on his loan with the value of his stock, nor with any payments made on account thereof. He has no right in such stock, or to the moneys which he has paid thereon, to which he would not have been entitled had he made no loan.

*Lawrence Cooper and A. P. Agee, for the appellant.*

*Knox, Bowie & Pelham, contra.*

586 HARALSON, J. The main question in this case, as stated by the appellant, is the right and power of the Southern Building and Loan Association to declare forfeited the shares of a borrowing member. Or, as stated by counsel for appellees: "The cause was submitted in the court below upon an agreed state of facts, and the single point of dispute turns upon the question of the right of the Southern Building and Loan Association to forfeit the shares of stock held by it as collateral, and the refusal of said association to credit its mortgage with the value of the stock, or the aggregate amount of the payments made by Isaac Linsky on account of said stock, or on account of said loan. There is no dispute as to what payments were made, but the Southern Building and Loan Association plants itself upon the proposition that it is entitled to recover the full amount of the original loan with interest, without any abatement for the value of the stock, or the aggregate amount of payments made by Isaac Linsky during the life of the loan. The learned court below held that this construction was inequitable and not within the contemplation of the parties at the time the contract was made, and that the junior mortgagee and the assignee for the benefit of creditors were entitled to redeem upon paying the amount of the mortgage loan, after deducting the value of the stock, or the aggregate amount of the payments made by said Isaac Linsky prior to making default." We thus have the issue plainly and sharply defined, and the parties treat the value of the stock as merely the aggregate of all the payments which have been made upon it, thus following the rule which is laid down in the books for

the ascertainment of its value: Endlich on Building Associations, secs. 455, 457, and authorities there cited.

This question has given rise to some confusion in the <sup>see</sup> decisions of courts. In North Carolina the transaction has been treated upon the basis of an actual loan of money, and the aggregate amount of payments upon stock as partial payments on the loan by the borrower: *Overby v. Fayetteville etc. Assn.*, 81 N. C. 56; *Hoskins v. Mechanics' etc. Assn.*, 84 N. C. 838. And the earlier Pennsylvania cases, previously to that of the *North America Building Assn. v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349, maintain the same view of the question. Commenting upon these decisions Mr. Endlich says that the supreme court of Pennsylvania, in *North America Building Assn. v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349, for the first time approached an understanding of the nature and dealings between the building association and its members; that, under the rulings in the former cases in that court, upon the theory of partial payments, it followed that each stock payment made by the borrowing member was a *pro tanto* reduction of his mortgage debt, to be deducted with interest from the date of payment; and he adds: "The fallacy of this doctrine is obvious from the fact that the borrower's standing as a member is not merged in his superadded character of debtor, and that, as a member, he is not entitled to an account of profits made by the society upon his contributions, before the period of its termination (or that of the series to which his stock belongs), whilst the settlement of his liabilities as a borrower is also referred to the winding up of the mutual scheme. It has therefore become a well-recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, *ipso facto*, work an extinguishment of so much of the mortgage. The fact that the borrower has assigned his shares to the society as collateral security for his debt makes no difference; for this is a recognition of the distinct standing of the member and as a debtor": Endlich on Building Associations, sec. 452. And it is a correct principle, as has been held, that there is no connection established between the stock held by the stockholder and the bond held by the company, such as that payments made on stock are to be treated as payments on the bond, so that one is steadily offset against the other, or the one merges in the other—a fallacy sometimes indulged, arising from a failure to observe the separate existence of the stock

on the one hand and the bond on the other—the separate <sup>588</sup> relation borne to the company, on the one side, by its stockholder, and, on the other, by its borrower. The payment on the one is not necessarily a payment on the other: *State v. Hornbacker*, 42 N. J. L. 635; *Endlich on Building Associations*, sec. 452. Mr. Freeman in an extended note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 163, gives approval to the same principle, citing a long list of cases in support thereof; and the learned annotator adds, as a conclusion from the very many authorities he cites, as to the amount that the borrower ought justly to pay when he wishes to withdraw, or is in default, and his mortgage is sought to be enforced, that, “It must be remembered, that when a member obtains a loan or advance, he anticipates the amount he is to receive upon the termination of the association, or of the series to which it belongs. His obligation does not look to a repayment before that time. If he desires to withdraw, or it becomes necessary to enforce his mortgage against him before that period arrives, the question is, what amount ought he equitably to pay? In ascertaining this amount the only difference between the two cases seems to be, that when he voluntarily withdraws he is entitled to receive the *bonus* or share of profits allowed him under the laws of the associations, and when he is in default no such allowance is to be made him.” The justness of this conclusion is vindicated on the ground that the defaulting member’s action is an injury to the association, arising out of a breach of his obligations, for, if he continue from time to time, for purposes of his own convenience, to withhold his contributions to the common fund, when they become payable, it is clear he is thereby depriving the association of just that much money, which ought to be invested for the common good; and, if this be allowed till the end, it is also plain he will have derived from his own violation of duty, an unjust advantage, in sharing with the other members, notwithstanding his defaults, an equal participation in the profits.

In principle there can be no difference in the rule as to the prompt payment of premiums on a policy in a life insurance company and the premiums and other dues on a building and loan contract, and this court, speaking of the former, said: “It is too late, at this <sup>589</sup> day, to raise any question as to the legal validity of such a contract. To one who understands any thing of the principles upon which the business



of life insurance is conducted it is obvious that the punctual payment of premiums is of the very essence of the contract. The calculations of insurance actuaries, fixing the rates of insurance, are based on the theory of prompt payment, so as to afford opportunity for such reinvestment as to reap the fruits of compound interest upon the company's moneyed capital. Laxity in the enforcement of punctual payments might, and no doubt would, frequently lead to ultimate, if not speedy, financial ruin. Stipulations, therefore, incorporated in insurance policies, making such payments conditions precedent to the continued liability of the insurer, are generally maintained as valid by the courts": *Alabama Gold Life Ins. Co. v. Thomas*, 74 Ala. 582. Forfeitures for the non-payment of premiums is a necessary means, for insurance or building and loan companies, of protecting themselves from embarrassment, and delinquency cannot be allowed except at the option of the companies: *New York etc. Ins. Co. v. Statham*, 93 U. S. 24; *Klein v. New York etc. Ins. Co.*, 104 U. S. 88. In keeping with this doctrine, Mr. Pomeroy lays it down, that a forfeiture of shares of stock in the corporation, duly incurred by the stockholders, for failure to pay the calls or installments thereon, as provided by the charter or by-laws of the company, will not be set aside or relieved against by a court of equity: 1 Pomeroy's Equity Jurisprudence, secs. 457, 458; 2 Story's Equity Jurisprudence, secs. 1325, 1326.

With these principles in view, let us inquire into the particulars of the case we have before us. This association was chartered under the provisions of the code, part 2, title 1, chapter 4. Section 1556 confers upon building and loan associations chartered thereunder the power: "4. To make all needful rules and regulations and by-laws for the transaction of its business, and the management and control of its affairs; . . . 6. To compel payment and compliance with all lawful orders by fines and forfeitures"; and "12. To secure the payment of installments and loans, and a compliance with all the terms on which loans are purchased, by mortgages, with power of sale, on real estate, and the same to foreclose on default," etc.

The association adopted a code of by-laws, clearly <sup>590</sup> within the statutory powers conferred, by which it was provided, among other things, that the certificate, terms, and conditions of the shares of the association and the by-laws

form the contract with the shareholder; that persons desiring to become shareholders must make application according to forms provided for that purpose, the application forming a part and parcel of the applicant's contract with the association (and in these applications there is an agreement by the applicant that he will comply with all the rules and regulations of the association); that all loans must be secured by note and first mortgage on real estate, the borrower to pay interest and a premium, at the rate of five per cent per annum each, the same to be paid on or before the fifth day of each month during the continuance of the loan; that all shareholders are to pay a monthly installment each of thirty-five cents on each share (of fifty dollars) named in the certificate on or before the 5th of each month, without notice, five cents of which shall be placed to the expense account; that members in good standing may withdraw the amount paid by them in monthly installments of shares into the loan fund, together with interest at the rate of six per cent per annum, after giving sixty days' notice in writing, such notice to be given after the expiration of two years; that, if any shareholder shall neglect to pay the interest or premium on his loan, or his regular monthly installments or other fees, for three months, or in any way fails to comply with his contract, the association may compel payment of principal and interest, and premiums, fines, and dues by proceeding on his note, and foreclosing the mortgage or other security, which shall at once become due and payable, and the association may cancel and treat as forfeited the said shareholder's shares, whether deposited as collateral security or not, and all payments made thereon shall be forfeited to the association; and that time, punctuality, and strict performance on the part of all shareholders in the payment of premiums, fines, installments, interest, and loans is made the essence of the contract.

Linsky signed his applications for the loan he received, and in them he agreed: "I will also comply with all the rules and regulations of the association." They were approved, and under them he received a loan from the association for two thousand dollars on the 16th of June, 1890, for <sup>591</sup> which he executed and delivered his note or bond, payable six years after date, with interest thereon, and the premiums bid in his applications, and payable according to the by-laws, and assigning in said note as collateral security to the

association for the sum loaned to him, and for the payment of the monthly installments required of him, his forty shares of stock in the association. In the conclusion of the note is the provision: "And it is stipulated that, in the event I make default in the payment of said installments, interest, premiums, or fines to said association, for the period of three months, then this bond shall mature and become payable, and I hereby authorize said association to cancel my said shares, and the same shall be thereby forfeited." At the same time he executed the mortgage, a copy of which is attached to the answer of the association, conditioned that, "if the said Isaac Linsky shall well and truly pay said sum of two thousand dollars, as evidenced by said note, at the maturity thereof, . . . and shall also promptly [pay] on the 5th day of each month, the installments due on his shares, until the amount in the loan fund to the credit of his shares, from monthly payments and profits, equals fifty dollars for each share on which said loan is made, and shall also promptly pay the monthly interest on said loan, and the premiums so bid by him monthly, and shall comply with the laws of said association, then this conveyance shall be null and void, otherwise to remain in full force and effect," subject to foreclosure as provided therein. On the fifteenth day of September, 1892, said Linsky having made default in the payment of the installments on his stock, interest, premium, and fines for more than three months, and never having filed an application for the withdrawal of his shares of stock, after he had been paying thereon two years, or at any other time, the association, by resolution duly adopted, declared the said forty shares of stock of said Linsky forfeited to the remaining stockholders of said association, and the same was passed to the credit of the loan fund of the association.

From what has been said it appears, then, that the association was duly organized under a charter obtained under the general law of the state for that purpose; that the statute under which it was organized authorized it to make all needful by-laws for the transaction <sup>592</sup> of its business, and to compel payment and compliance with the by-laws by fines and forfeitures; that the association adopted by-laws which provided for the forfeiture of the stock of its shareholders if they failed for three months to pay the stipulated contributions to the association, as provided by the by-laws and the

contract of the borrower; that Linsky agreed to abide these rules and regulations, and agreed that they should be a part of his contract of loan; that he executed his note and mortgage, and agreed therein that, if he failed to comply with the terms of his contract, his stock should be forfeited to the association; that he did make default, and that the association, in accordance with its by-laws, declared his stock forfeited.

The policy of the law favored the forfeiture, the statute authorized it, the rules of the association and the contract of the parties provided for it, and the association declared it in accordance with the terms of the contract and by-laws. We find thus erected, against our declaring this forfeiture unconscionable and inequitable, as we are asked to do in this bill, a barrier so high we are unable to surmount it.

The appellant is entitled to the full amount of its said loan, principal and interest, according to the terms of the contract, from the time said Linsky ceased to pay the same thereon, without any abatement for the value of the stock forfeited; and, if the same is not promptly paid, in redemption of its said mortgage by the complainant in the cross-bill, or by the complainant in the original bill—the complainant having submitted itself to the authority of the court to that end—it is entitled to a decree of foreclosure of its said mortgage, and to a sale of the real property therein described for the payment of its said debt and interest.

The complainant in the cross-bill is entitled to redeem from the mortgages of the appellant and of the Anniston Loan and Trust Company, by paying the amounts that may be ascertained to be due thereon, respectively, within a short time to be specified by the court; and in default of such redemption by him, then the complainant in the original bill, the Anniston Loan and Trust Company, is entitled to redeem from the mortgage of the defendant, the Southern Building and Loan Association, by paying the full amount due thereon, principal and interest, <sup>522</sup> without abatement for alleged payments thereon, and in that case, to the decree of the court foreclosing its own mortgage, and that of said association, so redeemed by it, and to a sale of the real estate in said mortgages mentioned for the payment of its own debt and that of said association which it has paid.

The decree of the court below is reversed, and the cause

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remanded for further proceedings in conformity with the above directions.

Reversed and remanded. \_\_\_\_\_

**BUILDING AND LOAN ASSOCIATIONS.**—Foreclosure and ascertaining amount due upon mortgages, see the extended note to *Robertson v. American Homestead Assn.*, 69 Am. Dec. 163.

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CASES  
IN THE  
SUPREME COURT  
OF  
ARKANSAS.

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TOMBLER v. KOELLING.

[80 ARKANSAS, 62.]

**BAILER, DUTIES OF.**—A bailee to whom property is intrusted for safekeeping must, by ordinary care and diligence, keep it safely, and, if it is lost through a failure to observe such duty, he is answerable.

**BAILLES, LIABILITY OF.**—The keeper of a bath-house who gives a check to a customer for valuables of the latter, and thereafter delivers them to another person who had stolen such check, is liable therefor, though the bailor had been guilty of negligence, enabling the thief to steal the check, if the bailee knew the property and the owner, and would not have delivered it on the check had he taken pains to look at the person by whom it was presented.

**ACTION** to recover the value of certain articles intrusted by the plaintiff to the defendant for safekeeping. The latter was the keeper of a bath-house, and the former one of his customers, to whom a check had been given on his depositing certain articles before entering his bathroom. The check was left in his clothing in the room, and, while he had gone temporarily into a hall to cool off after taking a bath, some person entered the room and stole the check, and presented it to the defendant, and received the property represented by it. The defendant knew the property and who was its owner, and, if he had looked at the party who presented the check, would have known that he was not entitled to the property. There was evidence tending to show that when the plaintiff was taking his bath he knew that another person was occupying an adjoining bathroom, and that the door communicating between the two rooms was not fastened, and it was insisted by the defendant that the plaintiff, in going into the

hall and leaving the check in his clothes, under these circumstances, was guilty of negligence, and that the defendant ought not to be held answerable, and it was also claimed on the part of the defendant that the plaintiff had, at various times, been specially cautioned to take good care of his check. The defendant asked for several instructions, which, though somewhat different in form, were substantially identical in substance, and were to the effect that, if the plaintiff had been warned by the defendant to be careful of his check, and knew that another person was occupying the adjoining bathroom while his clothes and the check remained therein, he was guilty of such negligence as precluded his recovery. The court declined to so instruct; the jury found a verdict for the plaintiff, and the defendant appealed.

*G. G. Latta*, for the appellants.

*G. W. Murphy*, for the appellee.

“ HUGHES, J. This is a case of bailment for a consideration received by the bailee, who was bound to exercise ordinary care and diligence to preserve and restore the property delivered by the bailor to the bailee, or to some one who was authorized by the bailor to receive it. The property was not so delivered by the bailee, but was delivered to another, who was not authorized to receive it. The bailee knew the bailor and his property well, and testified: “If I had looked at the party who presented the check I would have known he was not entitled to the package.” The check was a means of identification of the property, but was no evidence that the owner of the property had parted with his title to it, or that he had authorized its delivery to any one who might present the check, though not entitled to receive it.

Where property is committed to the custody of a bailee for safekeeping it is the bailee's duty to use ordinary care and diligence to keep the property safely, and, “ if it is lost through the failure on his part to do so, he is liable. A negligent delivery of the property by him to another, whereby it is lost to the owner, will not relieve him from liability. Had the bailee not previously known the bailor and the property there might have been some excuse for delivery of the property to the person who presented the check for it, though he was not entitled to receive it; but such a case is not presented or decided here.

It seems that, though the bailor was not as prudent as he ought to have been, yet the bailee might have avoided the loss by the exercise of ordinary care, which is such care as a prudent man would exercise, under like circumstances, to protect his own interest. The instructions numbered one, two, and three, refused, ignored the negligence of the superintendent, Clark, and were properly refused. The fourth, refused, does not seem objectionable, but the refusal of it was not prejudicial, as the evidence clearly shows that the property was lost through the want of ordinary care upon the part of the bailee.

The judgment is affirmed.

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**BAILMENT—DUTY AND LIABILITY OF BAILER.**—A bailor for hire is liable for ordinary neglect: *Woodruff v. Painter*, 150 Pa. St. 91; 30 Am. St. Rep. 786, and note. All bailees are required to exercise care and diligence in keeping safe the thing bailed, but different degrees of diligence are required according to the nature of the bailment: *Merchants' Nat. Bank v. Guilmar-tin*, 93 Ga. 503; 44 Am. St. Rep. 182, and note. See, also, the extended note to *Isham v. Post*, 38 Am. St. Rep. 782.

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## NEELEY v. STATE.

[80 ARKANSAS, 66.]

**PRINCIPAL AND AGENT—LIABILITY.**—To EXCUSE A PERSON FROM LIABILITY ON THE GROUND THAT HE ACTED AS AN AGENT he must show that he, at the time of making the contract, disclosed the name of his principal and the fact that he was acting in his behalf.

**LIQUOR, SALES OF TO MINORS WHO ARE ACTING AS AGENTS.**—If liquor is sold to a minor who at the time declares that he is purchasing it for another whose name is not disclosed the sale must be regarded as made to the minor, and not to the undisclosed principal, and the seller is liable to punishment under a statute making it criminal to sell liquor to a minor.

The appellant, *pro se*.

*James P. Clarke, attorney general, and Charles T. Coleman,*  
for the appellee.

<sup>67</sup> Wood, J. The defendant was convicted of selling liquor to a minor, under section 1812 of Sandels and Hill's Digest. The proof on behalf of the state showed that a minor purchased of the defendant one bottle of whiskey without the written consent of his parents, but informed defendant at the time that he wanted the whiskey for two sick teachers of



Galloway college, who had furnished him the money, and sent him for the whiskey; that the whiskey was delivered to them, and he did not drink any himself. The names of the teachers he did not want to disclose, and thinks he did not tell defendant their names. The defendant for himself testified that he did not sell the liquor, but sent it to the teachers whose names the minor gave him, and as they were his friends and sick, he did not charge them for the whiskey.

The substance of the court's instructions was that, if the minor purchased the whiskey for two teachers, as their agent, without disclosing their names to the defendant <sup>as</sup> at the time of the purchase, the defendant would be guilty. But, if the defendant gave the whiskey to the minor for the adults, although their names were not disclosed, or if he did not sell the whiskey, he would not be guilty, under this indictment. The defendant asked the court to charge the jury, in substance, that if the minor bought the liquor for the two teachers, and told the defendant he was purchasing for them, the defendant would not be guilty, although the names of the teachers were not disclosed.

The question is, was it a sale to the minor, who disclosed the fact of agency, but did not give the name of his principal?

This court is committed to the doctrine that a minor may be the agent of a purchaser or donee of liquor: *Wallace v. State*, 54 Ark. 542; *Sicheluff v. State*, 52 Ark. 56. In the latter case it is said: "As between a seller and an agent who deals with him without disclosing the fact that he acts as agent, the latter as well as the principal is the purchaser." It is also a well-recognized principle that "though the agent discloses the fact that he is agent, but conceals the name of his principal, he may be held personally liable as principal": *Mechem on Agency*, sec. 554. Chancellor Kent says: "It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is responsible, and not the agent. If he contracts in behalf of his principal, and discloses his name at the time, he is not personally liable. But if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf": 2 Kent's Com-

mentaries, 630, 631. And in Judge Story's work on Agency it is said: "If the agent <sup>69</sup> should at the time of the purchase of the goods, acknowledge that he is purchasing for another person, but should not then name him; in such case he would be held personally liable, although the principal, when discovered, might also be liable for the debt": Story on Agency, sec. 267. The doctrine of these text-writers is approved and well supported by others, and by many adjudicated cases: Wharton on Agency, sec. 500; *Owen v. Gooch*, 2 Esp. 567; *Thomson v. Davenport*, 9 Barn. & C. 78; *Taintor v. Prendergast*, 3 Hill, 72; 38 Am. Dec. 618; *Welch v. Goodwin*, 123 Mass. 71; 25 Am. Rep. 24; *Smith's Mercantile Law*, sec. 201; *Stackpole v. Arnold*, 11 Mass. 27; 6 Am. Dec. 150; *Dunlap's Paley's Agency*, 369, et seq.

The rule is for the protection of the party dealing with the agent; as Judge Kent says, "to enable him to have recourse to the principal in case the agent had authority to bind him": 2 Kent's Commentaries, 631. But it may be said that in this case the principal was sufficiently designated. Not so. The language of the minor, whom the jury believed, was: "I told the defendant I had two sick teachers, and I wanted some whiskey for them. I don't think I told the defendant the names of the teachers." This is not naming the principal, in the sense the law requires. Had it been shown that there were only two teachers in Galloway College who were known to defendant the case might have been different. In a suit against the agent, in such a case, upon a valid contract, the burden would be upon him to show that there were only two teachers. If there were more than two it would be impossible, without a disclosure of their names, to tell which two of the teachers was intended at the time as principal, and which two the seller was contracting with. An agent could not exonerate himself under such circumstances from liability, although the real principal, when discovered, might also be bound: <sup>70</sup> Story on Agency, sec. 267; *Smith's Mercantile Law*, sec. 201; *Winsor v. Griggs*, 5 Cush. 210; *Cabot Bank v. Morton*, 4 Gray, 160.

In *Cobb v. Knapp*, 71 N. Y. 348, 27 Am. Rep. 51, it is held that "it is not sufficient that the seller may have the means of ascertaining the principal of the agent. He must have actual knowledge": 1 Parsons on Contracts, 64, note; *Raymond v. Crown & Eagle Mills*, 2 Met. 319.

Where the name of the principal is not disclosed the pre-

sumption is the agent intended to be liable. And where the seller does not ask the name of the principal, when unknown, the presumption is he only intended to bind the agent.

The case under consideration was a cash transaction. But it was necessary to discuss it from the standpoint of a credit transaction, in order to determine the true test of agency.

In the light of the above familiar principles no error is found in the charge of the court, and its judgment is therefore affirmed.

**AGENCY—PERSONAL LIABILITY OF AGENT.**—An agent who contracts in his own name and fails to disclose his principal's name at the time of making a contract for the sale or purchase of goods is personally liable for whatever obligations may arise out of the contract: *Argersinger v. Macnaughton*, 114 N. Y. 535; 11 Am. St. Rep. 687, and note; *Clealand v. Walker*, 11 Ala. 1058; 46 Am. Dec. 238, and note; *Stone v. Wood*, 7 Cow. 453; 17 Am. Dec. 529, and note. See the notes to the following cases: *Hobson v. Hassett*, 9 Am. St. Rep. 196, and *Tarver v. Garlington*, 13 Am. St. Rep. 632.

**INTOXICATING LIQUORS.—SALES TO MINORS ACTING AS AGENTS:** See the extended notes to *Snider v. State*, 12 Am. St. Rep. 354, and *State v. Kittelle*, 28 Am. St. Rep. 707.

## OGDEN v. OGDEN.

[60 ARKANSAS, 70.]

**CONVEYANCE FROM A HUSBAND TO HIS WIFE IS NOT VOID.**—Its effect is to give her an equitable estate while he holds the legal title as her trustee.

**TENANCY BY THE COURTESY.**—On the death of a wife holding an equitable estate her husband becomes tenant by the courtesy thereof.

**HOMESTEAD.—A WIDOW CANNOT HAVE ANY RIGHT OF HOMESTEAD** in land in which her husband had a life estate only or in which he held the title in trust for another.

**STATUTE OF LIMITATIONS.—THE ESTATE OF A REVERSIONER** cannot be affected by the statute of limitations during the lifetime of the tenant for life who is in possession of the property. The possession of the latter cannot be adverse to the former.

**PLEADING.—A DEFECT IN A COMPLAINT MAY BE CURED BY THE ANSWER.**

*Joseph M. Hill*, for the appellant.

*Turner & Turner and E. B. Pierce*, for the appellees.

<sup>72</sup> RIDDICK, J. This was an action brought by appellees to recover possession of certain lots in the town of Van Buren. The appellees, who are the children of John B.

Ogden, Sr., and his first wife, Jane Ogden, allege that their father, being the owner of the lots in controversy upon which his residence was located, conveyed the same to their mother. The mother of appellees <sup>73</sup> died in 1866, and their father afterward married appellant, and continued to reside upon, and exercise acts of ownership over, the premises in question until his death in 1889. Appellees claim the land as heirs of their mother.

The appellant admits that John B. Ogden, Sr., the father of appellees and her husband, was the owner of the lots in controversy, as alleged in the complaint; but she denies that he conveyed said lots to Jane Ogden, the mother of appellees, and alleges that he died seised and possessed of the same, and that she is entitled to the same as her homestead. The action was brought at law, and afterward plaintiffs moved to transfer the same to the equity docket. The motion was conceded by defendant, and the cause transferred to the equity docket. Upon the hearing of the case there was a finding and judgment in favor of the appellees for the possession of the property, from which an appeal was taken.

While not free from doubt, we think the evidence sustains the allegation of the complaint that John B. Ogden, Sr., about the year 1860, conveyed the premises to his first wife, Jane Ogden, the mother of appellees, and that the deed executed to her was recorded.

By the common law a husband could not make a grant of property to his wife. Such a conveyance was of no validity. But it is now generally held that, in the absence of fraud, such conveyances are not void. The result of this conveyance by Ogden to his wife was to give her the equitable estate, while he held the legal title as her trustee: *Dyer v. Bean*, 15 Ark. 519; *Jones v. Clifton*, 101 U. S. 225; *McMillan v. Peacock*, 57 Ala. 129; *Wilder v. Brooks*, 10 Minn. 50; 88 Am. Dec. 50, and note; 9 Am. & Eng. Ency. of Law, 792.

After the death of Jane Ogden her husband became entitled to an estate in the lots owned by her for the residue <sup>74</sup> of his life, as tenant by curtesy, and this was so, although her estate was only an equitable one: *Williams on Real Property*, 17th ed. 281, 287; 4 Am. & Eng. Ency. of Law, 965. The appellees inherited the equitable estate of their mother, subject to the life estate of their father; and when it terminated by his death, they, being his heirs also, became at the

same time the owners of both the legal and equitable estates, and the latter became merged in the former.

When the husband has only a life estate in the land upon which he lives his widow can of course have no homestead therein. Nor has she the right of homestead in land to which her husband holds the legal title only as trustee for another who owns the equitable or beneficial estate. After the death of their father the right of appellees to recover at law was therefore clear, unless barred by the statute of limitations.

As a general rule, in order to acquire title by adverse possession, the holding must be against one entitled to the possession of the land held and having the right to bring an action for its recovery. For this reason it has been frequently decided that the statute of limitations does not run against a reversioner until the death of the tenant for life. As John B. Ogden, Sr., held a life estate in the land of his wife, the appellees had no right of action until his death, and their right to recover is not affected by his possession. He and they held different parts of the same estate. He held the life estate; they held the reversion; and his possession could not be adverse to them: 1 Washburn on Real Property, 5th ed., 132; Newell on Ejectment, 764; Tyler on Ejectment, 923; *Jones v. Freed*, 42 Ark. 357.

This action was brought on the law side of the docket, and afterward, by consent or without objection, was transferred to the equity docket. It is insisted that, as the complaint was not amended so as to show <sup>75</sup> an equitable cause of action, a court of equity could not render a judgment at law, and that to do so was error. Although it was a law case on the equity docket the court heard and determined it in accordance with the principles of law involved, and this was the proper course to pursue: *Trulock v. Taylor*, 26 Ark. 59; *Organ v. Memphis etc. R. R. Co.*, 51 Ark. 259. It was not necessary to amend the complaint so as to show an equitable cause of action, for plaintiffs were not seeking any equitable relief. They had both the legal and equitable estates, and their prayer was for the possession of the premises, to which they were entitled. It is true that, in asking the court to have the case transferred to the equity side of the docket, they stated that they had a title exclusively cognizable in equity; but it is easy to make mistakes, and he who commits

one error is not required, in order to be consistent, to follow it to the end.

In one respect the complaint does seem to be defective. It alleges that the mother of appellants was the owner of the premises in question, and shows other facts that entitle their father, John B. Ogden, Sr., to an estate for life as tenant by curtesy, and it does not allege that he was dead. But a defect in the complaint may be cured by an answer, and we think that this defect was cured by the answer of plaintiffs, which directly alleged the death of said Ogden: *Pindall v. Trevor*, 30 Ark. 249; Bliss on Code Pleading, 3d ed., 437.

Finding no error, the judgment of the circuit court is affirmed.

**DEED DIRECTLY FROM HUSBAND TO WIFE**, or from the latter to the former, vests the equitable title in her or him in equity, though such deed is void at law: *Turner v. Shaw*, 96 Mo. 22; 9 Am. St. Rep. 319, and extended note.

**HOMESTEAD BY WIFE IN LAND IN WHICH HUSBAND HAD LIFE ESTATE:** See the extended note to *Pryor v. Stone*, 70 Am. Dec. 345.

**PLEADING—CURING DEFECTS.**—Averments in the answer may cure a complaint defective in material allegations: *Erwin v. Shaffer*, 9 Ohio St. 43; 72 Am. Dec. 613, and note; *Lyon v. Logan*, 63 Tex. 521; 2 Am. St. Rep. 511.

**CURTESY—TENANCY BY, WHEN ARISES.**—In the real estate of a deceased wife the surviving husband's estate in the majority of the states is that of a tenant by the curtesy as at the common law: Extended note to *In re Ingram*, 12 Am. St. Rep. 85. See, also, the extended note to *Jackson v. Jackson*, 15 Am. Dec. 450.

## ROGERS v. STATE.

[60 ARKANSAS, 76.]

**JURY TRIAL, HARMLESS ERROR.**—If the defendant in a trial for murder is found guilty of manslaughter an error of the court in defining the words "willfully and deliberately" is harmless.

**MURDER.—IF ONE WOUND IS INFLICTED WHILE ACTING IN SELF-DEFENSE AND ANOTHER AFTER THE DECEASED HAS DECLINED ALL FURTHER COMBAT** and was fleeing from the defendant, and each wound was sufficient to have produced death, he may be adjudged guilty of murder in inflicting the last wound if it contributed to the death, though had it not been inflicted, the deceased would have died from the wound given by the defendant while acting in necessary self-defense. If, however, the latter wound did not contribute to the death of the decedent, then he is not guilty of any degree of homicide.

**CRIMINAL LAW—HOMICIDE.—GREAT BODILY INJURY** does not necessarily amount to a felony committed on the person. Whether, in any case, the circumstances are such as to justify one in believing that such an

injury is about to be committed on him must, to a great extent, be left to the judgment of the jury.

**JURY TRIAL—INSTRUCTION WHICH MUST BE REDUCED TO WRITING.**—If, during the argument of a cause, counsel makes a statement of law which the court deems incorrect, it may admonish him to desist, and if in doing so the court makes what it deems to be a correct statement of the law and for the purpose of correcting that made by counsel, and no request is made that such statement be reduced to writing, the action of the court is not in violation of a statute requiring all instructions to the jury to be in writing.

**WITNESSES.**—A JUDGE WHILE PRESIDING AT THE TRIAL OF A CRIMINAL CASE may not, against the objection of the defendant, testify as a witness.

PROSECUTION of Rogers on an indictment charging him with the murder of Kernoodle. They engaged in a combat during which Rogers drew his pistol and twice shot the decedent. There was evidence tending to show that when the second shot was fired the decedent had desisted from the combat and was running away from the defendant screaming, "Murder." The wounds occasioned by each shot were in the opinions of medical experts fatal, though they were less certain upon this subject respecting the last wound than the first. There was a conflict of evidence respecting which of the parties was the aggressor in the combat. Some of the evidence tended to show that the killing was premeditated on the part of the defendant, while other evidence was to the effect that the decedent was the aggressor, and, being a large and powerful man, he struck the defendant a violent blow with his fist and was about to throw him down when the first shot was fired. Verdict finding defendant guilty of voluntary manslaughter. His punishment was fixed at five years in the penitentiary.

*A. S. McKennon, J. E. Cravens, and Martin & Murphy, for the appellant.*

*James P. Clarke, attorney general, and Charles T. Coleman, for the appellee.*

**79 RIDDICK, J.** We need not consider the objections urged against the definitions of the words "willfully" and "deliberately" contained in instruction No. 1, given by the court. The object of those definitions, we suppose, was to inform the jury concerning the distinctions between the different degrees of homicide. As the defendant was only convicted of manslaughter it is plain that, whether erroneous or not, they did him no harm. We find no error in either of the instructions

numbered 2, 9, and 11, given by the court on its own motion, and to which defendant excepted. When taken in connection with the other instructions we think they state the law as favorably to appellant as he had the right to demand.

The twelfth instruction given by the court, and to which the defendant objected, is as follows: "12. If the jury believe that the defendant inflicted upon the body of the deceased two mortal wounds, that both wounds were necessarily fatal, and either of which, independent of the other, would have produced and resulted in the death of the deceased within a short time, of which two wounds the jury believe the deceased died, and the jury further find that the deceased had in <sup>so</sup> good faith declined all further contest with defendant, and that, whilst deceased was fleeing from him, defendant inflicted the second fatal wound upon the body of the deceased by shooting him a second time, although the jury might believe the defendant fired the first shot in self-defense, the killing would not be justifiable, but would amount to manslaughter only."

It is said by Mr. Bishop that "whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide, though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed either medietely or immediately to the death in a degree sufficient for the law's notice": 2 Bishop's New Criminal Law, sec. 637. To same effect see *Kee v. State*, 28 Ark. 160.

If the defendant fired the first shot in necessary self-defense, and then afterward, when Kernoodle had abandoned the contest, and was fleeing, he again fired upon him, inflicting another wound, when the circumstances were not such as to make a reasonable man in his situation believe that he was then in immediate danger of great bodily injury, he would be guilty either of some degree of homicide, or of an unlawful assault, depending upon the question whether or not the wound inflicted by the last shot either caused, contributed to, or accelerated his death. In other words, if the last shot was not fired in necessary self-defense, and the wound inflicted by it either caused his death, or contributed to or hastened it, the defendant would be guilty of some degree of homicide, even though the first shot was fired in



self-defense, and, though, at the time the last shot was fired, the deceased was already so severely wounded that his death would have followed in a very short time. On the other hand if the first shot was fired in self-defense, <sup>81</sup> and the last shot neither caused his death, nor contributed to, or hastened it, then he could not properly be convicted of any degree of homicide, but might be convicted of an assault: *Davis v. State*, 45 Ark. 464.

The court, in giving instruction No. 12, doubtless had these rules of law in his mind, and the instruction, abstractly considered, is nearly correct, if not entirely so; but we doubt if in this case it presented the question in such a way as to let the jury understand that, in the event the first shot was fired in self-defense, then it became material for them to determine whether the last shot contributed to or hastened his death. Instruction No. 4 asked by the defendant substantially covered the law on this point, but it was rather long, and also stated that, if the second shot did not contribute to the death of deceased, the jury must acquit; whereas they might still have found defendant guilty of an assault.

Another question raised by counsel is concerning the meaning of the phrase "great bodily injury." One of the counsel for defendant, in the course of his argument before the jury, stated that the law-books did not define such phrase, whereupon the court interrupted him, and said that the law-books did define it, and that its meaning was "a felony committed on the person." To this remark of the court defendant excepted at the time, and now contends that it was not a correct statement of the law, and that, even if correct, it should have been reduced to writing. It was held in *Regina v. McNeill*, 1 Craw. & D. 80, that to constitute "a grievous bodily harm," under a statute of George IV, it was not necessary to show that the wound be on a vital part, or that the injury be of a permanent nature, or that life be endangered thereby, but that proof that the prisoner committed an assault with a deadly weapon, whereby a severe wound was inflicted, was sufficient to sustain an <sup>82</sup> indictment for an assault to inflict grievous bodily harm. In the case of *Lawlor v. People*, 74 Ill. 230, the court said that the phrase "serious bodily injury" meant substantially the same as "great bodily injury," and that the meaning of both was a "high degree of injury, as opposed to a slight injury." The phrase "great bodily injury" is difficult to define, for the reason that it well defines

itself. It means a "great bodily injury," as distinguished from one that is slight or moderate, such as would ordinarily be inflicted by an assault and battery with the hand or fist without a weapon. To put one in danger of great bodily injury from an assault some thing more than attack with the hand or fist would usually be required, and it would rarely happen that one might lawfully take the life of another to avoid an assault with the fist only. But cases might be supposed when it would be justifiable to do so; for an assault and battery by a powerful man with his fist upon a weak one might be carried to such extreme severity as to produce great bodily injury, and yet be unaccompanied by such circumstances as to make it a felony. One who intentionally commits a great bodily injury upon the person of another may or may not be guilty of a felony, depending upon the circumstances; but, as such an injury may, under some circumstances, be committed, and still the offender not be guilty of a felony, it is therefore not accurate to define "great bodily injury" as "a felony committed on the person." What constitutes a great bodily injury, and whether the circumstances in any case are such as to justify one in believing that such an injury is about to be committed upon him, and in defending himself against it, are matters which must be left, to a great extent, to the judgment of the jury.

It is also contended that the court, before making this remark concerning the meaning of the phrase, "great bodily harm" or "injury," should have reduced it to writing; <sup>33</sup> but we do not think this contention is well taken. It is the duty of the court to restrain the remarks of counsel within proper bounds. If, in the opinion of the court, counsel should announce propositions of law to the jury which are incorrect and misleading, the court should admonish counsel so that he may desist. It is not necessary to stop to reduce the admonition to writing before making it; but, if it contains a statement of law calculated to influence the verdict of the jury, the court should, at request of counsel, reduce the same to writing, and, if necessary, repeat it in its written form to the jury. No request was made to reduce this remark to writing. The general request to put all instructions in writing cannot be held to cover this remark, for it was not intended as a part of the instructions, but only as a correction of what was conceived to be a misstatement of the law on the part of counsel.

During the progress of the trial the presiding judge was called as a witness, and, over the objections of the defendant, testified on behalf of the state. His testimony was, in substance, that at a former term of the court, before the change of venue was taken, the defendant had filed a motion for continuance on account of the absence of one Bert Cunningham, whom he alleged was a material witness in his behalf. Afterward Bert Cunningham appeared, and defendant having made an application for bail, the judge, in open court, notified the attorneys of defendant that they might take the testimony of said Cunningham to be used on the application for bail; to which notification the attorneys of defendant made no response, and took no steps to procure the testimony of said Cunningham.

It was not shown that the defendant was present at the time this notification was given to his attorneys, or that he in any way approved of the conduct of his attorneys in this regard; on the contrary, defendant testified <sup>84</sup> that he had been in prison, and did not know such notification was given. This evidence tended to make the impression that defendant had endeavored to procure a continuance on account of the absence of a witness whose testimony he did not want, when the failure to take this deposition may have been due to the neglect of his attorneys, and through no fault of the defendant.

We think it clear that the testimony was incompetent. The trial judge seems to have arrived at the same conclusion, and afterward, acting as a court, excluded the testimony which he had given as a witness. But the question still remains whether a judge, while presiding at a trial of a criminal case, may, against the objection of the defendant, testify as a witness on the part of the prosecution. The only reference to this question we find in our statute is section 2965 of Sandels and Hill's Digest. That section is as follows: "The judge or juror may be called as a witness by either party; but, in such cases, it is in the discretion of the court to suspend the trial, and order it to take place before another judge or jury; and when a party knows, at the time the jury are impaneled, that a juror is to be called by him as a witness, he shall then declare it, and the juror shall be excluded from the jury." This section was taken from the Code of Practice in Civil Actions, and is the same as section 660 of that code. There is a provision in the Code of Criminal

Practice that the provisions of the Civil Code shall apply to and govern the summoning and coercing the attendance of witnesses, and compelling them to testify in all criminal prosecutions; but that provision, we think, refers to the chapter of the civil code regulating the issuance of subpoenas for witnesses, and attachments for contempt. It does not refer to the competency of witnesses. While there are other portions of the Civil Code applicable to criminal proceedings, we do not find any where that this section is to apply to such proceedings; <sup>85</sup> on the contrary, the language of the section itself furnishes conclusive proof that it was only intended to apply to civil cases. It states that, when the judge or juror is called as a witness, it is in the discretion of the court to suspend the trial, and order it to take place before another judge or jury. It is plain that, on a trial of a defendant for a felony, after the jury are impaneled and sworn, the court would have no power, without the consent of the defendant, to suspend the trial, and order it to take place before another jury. So we conclude that this section was not intended to apply to criminal proceedings, and that we have no statute permitting a judge to testify as a witness in a criminal trial over which he is presiding.

In the absence of such a statute we think it clear that a judge cannot testify under such circumstances. It has been held in England that a judge may give evidence, but that if he does so, he must descend from the bench and cannot return thither during the trial: *Sichel's Practice Relating to Witnesses*, 14.

This rule was applicable to trials where the court was composed of several judges. In such a court a judge might descend from the bench, testify, and take no further part in the trial of the case, without interfering with the progress of the trial. Speaking of this question, Mr. Rapolje says: "If the judge sits alone he cannot be sworn at all; and, if he be one of the several judges, he ought not to be, unless he leaves the bench during the trial. In such a case the maxim that 'no one shall be both judge and witness in the same cause prevails':" *Rapolje on Witnesses*, sec. 45.

This question came before the supreme court of New York in a case where one of the two judges presiding had testified, and Folger, J., who delivered the opinion of the court, said that it was erroneous, "because such practice, if sanctioned, may lead to unseemly and <sup>86</sup> embarrassing results, to the hin-

dering of justice and to the scandal of the courts." In the same opinion, referring to the same matter, he says: "Other considerations may be added. If a judge is put upon the stand as a witness he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance that he may, for reasons sufficient to himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to the bench and take part in disposing of the interlocutory question thus arising, and, upon the decision being made, go back to the stand or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court, and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings": *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349.

This reasoning applies with even greater force where the court is composed of only one judge, for, if the judge of such a court takes the stand to testify against the defendant, there is no one to control his testimony or keep him within proper bounds. Even if he can control his own testimony and discharge at the same time what has been called "the incompatible duties of witness and judge," yet, however careful and conscientious he may be, the chances are great that by thus testifying he will to some extent detract from the dignity that should surround the functions of his high office. Instead of the impartial judge administering the law with a firm and even hand, he takes on for the time the appearance of a partisan, endeavoring to uphold by his testimony one side against the other. More than likely he provokes<sup>87</sup> unseemly conflicts between himself and counsel, and arouses the distrust of the party against whom he testifies. In addition to this, the higher his character and standing as a judge, the more danger that he thus gives the party in whose favor he testifies an undue advantage over the opposing side. For these reasons, in the interest of the dignity and decorum of the circuit court, and the orderly procedure therein, we feel compelled to hold that a judge presiding at a criminal trial cannot, against the objection of the defendant, be sworn and testify as a witness on the part of the prosecution: *Bishop's*

Criminal Procedure, sec. 1145; Underhill on Evidence, sec. 818.

We do not mean to intimate that in this case there was any partiality shown by the learned judge of the circuit court. The record shows to the contrary. The section of the digest above referred to is calculated to mislead, if not read carefully, and the mistake arose from being compelled to construe it in the hurry of a *nisi prius* trial. There were objections made to other rulings of the court, but, when taken in connection with the facts of this case, we do not discover any error except as above indicated. For those errors the judgment is reversed and the cause remanded for a new trial.

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**WITNESSES—EXAMINING MEMBER OF COURT AS.**—In the trial of a criminal cause one of the members of the court was examined as a witness without objection from either party. It was held that the court did not lose jurisdiction, but that an irregularity justifying the setting aside of a conviction had been committed had an objection been made and exception taken: *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349, cited in the note to *Roy v. Horsley*, 25 Am. Rep. 540.

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## FLORESHEIM BROTHERS DRY GOODS COMPANY v. LESTER.

[60 ARKANSAS, 120.]

**CORPORATIONS—FOREIGN, DOING BUSINESS WITHIN THE STATE, WHAT IS NOT.**—The taking of a single mortgage in this state by a foreign corporation, to secure a pre-existing debt for goods sold in another state, is not doing business within the state within the meaning of a statutory or constitutional provision prohibiting the doing of such business, except when the corporation maintains one or more places of business within the state and an authorized agent on whom process against it may be served.

**SUIT IN EQUITY TO FORECLOSE A MORTGAGE EXECUTED TO THE PLAINTIFF.** The defense was that the plaintiff was a foreign corporation, and therefore not entitled to maintain a suit. The law relied upon consisted of section 2 of article 12 of the constitution of the state declaring that "foreign corporations may be authorized to do business in this state under such limitations and restrictions as may be prescribed by law, provided that no corporation shall do any business in this state except while it maintains therein one or more known places of business and an authorized agent or agents in the

same upon whom process may be served," and section 1 of the statute enacted in 1887, to be found on page 234 of the statutes of that year, to the effect that "before any foreign corporation shall begin to carry on business in the state it shall, by its certificate under the hand of the president and the seal of the company, filed in the office of the secretary of state, designate an agent, who shall be a citizen of this state, upon whom service, summons, and other process may be served."

*T. E. Webber*, for the appellant.

*L. A. Byrne*, for the appellees.

**123** **HUGHES, J.** The only question in this case is whether the taking of a single mortgage in this state by a foreign corporation, for a past-due indebtedness for goods sold in the foreign state, the domicile of the foreign corporation, is doing business in this state, within the meaning of the constitution and the act of the general assembly above quoted. There can be no doubt that the sale and shipment of the goods was interstate commerce. It does not matter, then, how many sales and shipments there might have been; they could not be prohibited by the statute. There is no evidence that more than one mortgage was taken by the appellant in this state. Was the taking of this mortgage doing any business prohibited by the laws of this state to be done by a foreign corporation before complying with the provisions of the constitution and statute referred to? If so, the mortgage cannot be enforced in the courts of this state; for, if a single act of business be done by a foreign corporation in this state, within the meaning of these provisions of the law, it is as much within the prohibition contained in them as any number of acts of business would be. But we are of the **123** opinion that the taking of a single mortgage to secure a past due debt, with no intention apparent to transact other business of the kind in the state, is not doing business within the meaning of the constitution or the statute.

There is a division of authorities on this question. But we think the better view of the question is presented in *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, in which the court said: "Reasonably construed, the constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation

without the filing of the certificate and the appointment of an agent, as required by the statute. The constitution requires the foreign corporation to have one or more known places of business in the state before doing any business therein. This implies a purpose at least to do more than one act of business. For a corporation that has done but a single act of business, and purposes to do no more, cannot have one or more known places of business in the state. To have known places of business it must be carrying on or intending to carry on business. The statute passed to carry the provision of the constitution into effect makes this plain, for the certificate which it requires to be filed by a foreign corporation must designate the principal place in the state where the business of the corporation is to be carried on. The meaning of the phrase 'to carry on,' when applied to business, is well settled. In Worcester's Dictionary the definition is: 'To prosecute, to help forward, to continue, as to carry on business,' etc. . . . The obvious construction, therefore, of the constitution and the statute is that no foreign corporation shall begin any business in the state with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on <sup>124</sup> in the state, and naming an authorized agent residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business, when there was no purpose to do any other business or have a place of business in this state, would be unreasonable and incongruous."

The constitution and statute of Colorado, construed in this opinion, are substantially the same as ours. The strongest case, perhaps, apparently in conflict with the case in 113 United States, is *Farrior v. New England Mortgage Security Co.*, 88 Ala. 275.

The demurrer to the answer of appellees should have been sustained.

The judgment is reversed and the cause is remanded, with directions to sustain the demurrer to the answer.

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CORPORATIONS—FOREIGN—DOING BUSINESS IN THE STATE.—No legislative permission is necessary to allow a foreign corporation to contract for and buy machinery and supplies in one state necessary to the transaction



of its business in the state of its domicile, nor is it necessary in order to allow a foreign corporation to sell its wares or manufactures to the citizens of another state. In either case, if a debt is contracted, it may be collected in the courts of such state: *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Col. 499; 22 Am. St. Rep. 433.

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## HUNTON v. LUCE.

[80 ARKANSAS, 146.]

**JURISDICTION, JUSTICE OF THE PEACE.**—If a cause of action for a sum of money is so great as to be beyond the jurisdiction of a justice of the peace, the holder, before commencing suit, may, for the purpose of conferring jurisdiction, remit so much of such cause as will bring the residue within such jurisdiction, and, if he does so, the judgment of the justice for such residue is valid.

*Joseph M. Hill*, for the appellant.

*Humphrey & Warner*, for the appellee.

147 RIDDICK, J. This is an action brought by the appellee, Cornelia P. Luce, to declare void and enjoin the collection of a judgment in favor of appellants, and against one Sallie Falconer. The judgment complained of was rendered by a justice of the peace April 20, 1891, upon a promissory note executed by said Sallie Falconer July 8, 1888, for the sum of three hundred and six dollars and fifty cents, with interest at ten per cent. A transcript of this judgment having been filed with the clerk of the circuit court, as provided by law, it is claimed by appellants that such judgment is a lien upon certain land which appellee purchased from Sallie Falconer after said transcript was filed. Before the commencement of the suit against Sallie Falconer, appellants, in order to give the justice of the peace jurisdiction, remitted a portion of the amount due on the note by placing thereon the following indorsement: "Credit by amount remitted, \$7.50." The justice of the peace treated this as a remission of that amount from the principal of the note, and issued a summons to the defendant, Sallie Falconer, to appear and answer the claim of appellants for the sum of two hundred and ninety-nine dollars and interest due upon said note. Sallie Falconer failing to appear on the return day, the justice of the peace rendered judgment against her for the amount sued for, two hundred and ninety-nine dollars, and interest. As it is stated in the agreed statement of facts that the object of this

remission of seven dollars and fifty cents was to give jurisdiction to the justice of the peace, and as the justice and the parties before him looked at it in that light, and treated it as a remission of a portion of the principal of the note, <sup>148</sup> we feel convinced that such was the intention of the appellants in making the same, and shall consider it as a remission of so much of the principal of the note as exceeded two hundred and ninety-nine dollars. The question for us to determine is whether jurisdiction can be conferred upon a justice of the peace in that way. The decisions of the different states upon the question whether a plaintiff may, by remitting a portion of the amount due him on a note or contract, bring his case within the jurisdiction of an inferior court, are very conflicting. This court, so far as we know, has never passed directly upon this question; but its reasoning in several cases touching the question of jurisdiction is along the lines adopted by those courts that sustain the right of the plaintiff to bring his action within the jurisdiction of an inferior court by remitting a portion of his claim. Our constitution provides that justices of the peace shall have jurisdiction "exclusive of the circuit court in all matters of contract when the amount in controversy does not exceed the sum of one hundred dollars, excluding interest; and concurrent jurisdiction in matters of contract, when the amount in controversy does not exceed the sum of three hundred dollars, exclusive of interest." It will be seen that the jurisdiction of a justice of the peace in matters of contract depends upon the amount in controversy, exclusive of interest. In *Lafferty v. Day*, 7 Ark. 260, it was held that "the amount claimed by plaintiff is the sum in controversy, and determines the jurisdiction," and that, if the amount sued for be within the jurisdiction of a justice of the peace, the defendant cannot defeat the jurisdiction by showing that he owes the plaintiff more than he has sued for. In *State v. Scoggin*, 10 Ark. 328, Judge Scott, discussing a question concerning the jurisdiction of a justice of the peace, refers to the point raised here as follows: "So, upon a like foundation, it has been <sup>149</sup> repeatedly held by the supreme court of Alabama that, although an open account for an amount beyond the jurisdiction of a justice cannot be broken up so as to ground several actions before him, yet the plaintiff may elect to proceed for an amount within his jurisdiction by discarding so much of his account as may be beyond the justice's jurisdiction, and proceed only for such

items as may amount to the sum of that jurisdiction; and also of a note or bond after being reduced by voluntary credits—the recovery in all such cases going to the whole contract, and extinguishing all claim to that which was discarded.” He concludes, on this point, that a contract originally beyond the jurisdiction of a justice may be properly brought within it by credit, if the balance only be claimed.

A large number of cases by the courts of the different states on this question may be found collated in an opinion by Chief Justice Bleckley in a case lately decided by the supreme court of Georgia. After saying that “whether a creditor whose demand is created by express contract, such as a promissory note, can voluntarily abandon a part of his claim, or enter a credit upon it, for the express purpose of reducing it within the jurisdiction of a given court, is a question upon which authorities differ,” he adds, that “it is probable the weight of decisions is with the affirmative”: *Stewart v. Thompson*, 85 Ga. 830. The authorities on this question may also be found collated on pages 61 and 62 of “Courts and their Jurisdiction,” a book by Judge Works, where the author states the rule as follows: “A plaintiff may bring his action for less than is due him, remitting the balance, and thus bring his case within the jurisdiction of an inferior court.” See, also, note to *Grayson v. Williams*, 12 Am. Dec. 569, where the editor cites a number of cases holding, in substance, that it is not the amount of the plaintiff’s claim, but <sup>150</sup> the sum that he actually demands, which determines the jurisdiction. We have been favored by briefs from the counsel representing the different parties to this cause, in which the cases upon this question by the courts of the different states have been discussed and commented upon in an able and admirable way, but it would serve no useful purpose to further discuss such cases. We will only announce our conclusion that the appellants had the right to bring their case within the jurisdiction of the justice of the peace by remitting a portion of the principal of their note. We do not see that it is any violation of the rights of a debtor to allow his creditor to remit by voluntary credits a portion of his debt, and thus bring his claim within the jurisdiction of an inferior court. After the judgment of the inferior court is rendered upon the reduced claim the part remitted is completely extinguished, and can never afterward be asserted against the debtor. If the creditor desires to avail himself

of the speedy justice furnished by these inferior courts, at the expense of a portion of his claim, he should be allowed to do so. We therefore conclude that the judgment of the justice of the peace against Sallie Falconer for two hundred and ninety-nine dollars and interest was valid.

The decree of the circuit court declaring said judgment void, and enjoining the collection of the same, is therefore reversed, and the cause remanded.

HUGHES, J., being absent, did not participate.

**JUSTICES OF THE PEACE—JURISDICTION.**—A running account, though consisting of several items, cannot be divided to give a justice of the peace jurisdiction: *Grayson v. Williams*, Walker, 298; 12 Am. Dec. 563, and note with the cases collected.

## FLINN v. PRAIRIE COUNTY.

[60 ARKANSAS, 204.]

**WITNESS, EXPERT, FEES OF.**—A professional or expert witness may be compelled to attend court and to testify on a criminal trial respecting any fact within his knowledge, though it is one acquired by study and experience, and he cannot recover any fees in excess of those recoverable by other witnesses.

**WITNESS, COMPELLING SERVICE OF WITHOUT REWARD.**—A professional or expert witness cannot be compelled to make any examination or preliminary preparation, nor to attend the trial for the purpose of listening to testimony that he may be better enabled to give his opinion as an expert. For services of this character he may demand extra compensation.

*John D. Shackelford*, for the appellant.

The appellee, *pro se*.

<sup>205</sup> **RIDDICK, J.** The appellant, B. W. Flinn, who is a physician, was summoned to testify on the part of the state, as an expert, in a criminal case pending in the Prairie circuit court. He obeyed the summons, but, on being called as a witness, he asked the court to allow him his fees as an expert before compelling him to testify. The court refused to make such allowance, and required him to testify. Flinn afterward presented to the county court of said county a claim against the county for the <sup>206</sup> sum of one hundred and fifty dollars for his attendance and testimony in said case. The court rejected his claim, and, on appeal to the circuit

court, the judgment of the county court was affirmed. An appeal was taken to this court.

The only question for us to determine is whether an expert who testifies as such on behalf of the state in a criminal case may demand compensation in addition to the usual fees allowed witnesses in such cases. We have no statute authorizing the payment of extra compensation to experts. Our statute makes no distinction between different classes of witnesses. In the absence of a statute regulating it, the question is one of some doubt, for the decisions of the courts of the different states upon it are very conflicting. "In this country," says Professor Rogers, in his work on *Expert Testimony*, "the cases are nearly balanced, and the question must be regarded as still an open one, although the weight of authority rather inclines to the theory that the expert may be required to answer without additional compensation": Rogers on *Expert Testimony*, 2d ed., 425.

In a recent case decided by the Colorado court of appeals the rule was stated as follows: "The professional witness, in the discharge of his duty as a good citizen, is like any other person, whether he be laborer, merchant, broker, manufacturer, or banker, compellable to attend in obedience to process, and to testify as to what he may know, whether it be observed fact, or accumulated knowledge, acquired by study and experience": *County Commrs. v. Lee*, 3 Col. App. 177. This view is supported by the following cases: *Ex parte Dement*, 53 Ala. 389; 25 Am. Rep. 611; *Summers v. State*, 5 Tex. App. 374; 32 Am. Rep. 573; *State v. Teipner*, 36 Minn. 535; *Allegheny County v. Watt*, 3 Pa. St. 462; *Northampton County v. Innes*, 26 Pa. St. 156; *Israel v. State*, 8 Ind. 467.

The question has never been directly determined by this court, but there are dicta in some of the cases which <sup>207</sup> seem to support the theory that the expert cannot lawfully demand of the county extra compensation. In one case it was held that an attorney may be compelled without compensation to defend persons charged with crime who are unable to employ counsel: *Arkansas County v. Freeman*, 31 Ark. 266. In another case the court, in discussing the power of a coroner while holding an inquest, said: "He may summon a physician to testify, and compel him to swear to his opinion on a superficial view of the body": *St. Francis County v. Cummings*, 55 Ark. 421. All persons who, by study or practice in an occupation or profession, have become skilled

therein, and possessed of knowledge peculiar to the same, are, in law, called experts. There is not an art, trade, profession, or vocation that does not have them. It is evident, therefore, that, if all such witnesses are entitled to extra compensation when they testify as experts, the costs of criminal trials, in cases where such testimony is needed, will be much increased. In the case at bar the witness attended six days, and claims one hundred and fifty dollars. If the legislature had intended that such a large class of witnesses should receive additional compensation, it seems reasonable to believe that some provision would have been made for it in the statute. After considering the matter, we have concluded that, under our statute, a physician who testifies as an expert in a criminal case is not entitled to extra compensation from the county. It is the duty of every citizen to assist, within reasonable limits, in enforcing the criminal law of the state; and it is not unreasonable that he should be required, on behalf of the state, to give such information as he may possess toward the elucidation of any question arising in a criminal trial, whether that information be in the nature of expert evidence or not. He cannot be required to make any examination or preliminary preparation, nor can he be compelled to attend the trial, and listen to the ~~soe~~ testimony, that he may be better enabled to give his opinion as an expert. For any service of this kind he may demand extra compensation. But such information as he already possesses, that is pertinent to the issue, he can be made to give, whether such information is peculiar to his trade or profession or not. There is very little probability of any great hardship being imposed on physicians by reason of this rule. The subpoenas for witnesses are under the control of the court, and, as there are physicians in almost every town or village in the state, it cannot often be necessary for a court to compel one to attend beyond the limits of the county in which he practices, for the purposes of testifying as an expert, unless he is also a witness to other facts material to the case.

The appellant did not ask the court to excuse him on the ground that it was any special hardship for him to attend and testify in said cause. He only claimed extra compensation for the reason that he testified as an expert. In giving the state the benefit of such information as he possessed he performed a service which every citizen may be required to render for the public good. As physicians are required to

testify probably more often than any other class of experts it might be proper for the legislature to empower the courts to grant them extra compensation, but, in the absence of a statute to that effect, the courts can make no distinction between them and other witnesses.

Finding no error the judgment of the circuit court is affirmed.

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**WITNESSES—EXPERTS—FEES.**—A physician is punishable as for a contempt for refusing to testify as an expert in a criminal case without being paid for his testimony as for a professional opinion: *Ex parte Dement*, 53 Ala. 389; 25 Am. Rep. 611, and extended note; *contra*, *Buchman v. State*, 59 Ind. 1; 26 Am. Rep. 75. On a criminal trial it seems that a physician, who has made a *post-mortem* examination, may be compelled to testify concerning its results and his opinions derived therefrom: *Summers v. State*, 5 Tex. Ct. App. 365; 32 Am. Rep. 573.

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## BANK OF NEWPORT v. COOK.

[60 ARKANSAS, 283.]

**USURY.**—THE TAKING IN ADVANCE FOR the period of one year the highest rate of interest allowed by law upon a negotiable instrument does not constitute usury.

*Rose, Hemingway & Ross, and J. W. & J. M. Stayton*, for the appellant.

*J. W. House*, for the appellees.

\*\*\* HUGHES, J. The question in this case is, does the taking in advance of the highest rate of interest allowed by the constitution upon a negotiable promissory note payable twelve months after its date constitute usury?

The provision of the constitution (art. 19, sec. 13) upon the subject of usury is: "All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest, and the general assembly shall prohibit the same by law, but when no rate of interest is agreed upon, the rate shall be six per centum per annum."

The act of the legislature approved February 9, 1875, only a few months after the adoption of the constitution, upon the subject of discounting commercial paper, mortgages, or other securities, is as follows: "It shall be lawful for all parties loaning money in this state to reserve or discount interest upon any commercial paper, mortgages, or other securities

at any rate of interest agreed upon by the parties, said rate not to exceed ten per cent per annum." The only limitation in this act is upon the kind of paper, so far as it affects the case at bar, and that is that it shall be commercial paper. In *Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep. 73, this act is held to be constitutional when the paper discounted, or upon which interest is reserved, is three months' paper, used in commercial transactions; the question in that case having arisen upon, and necessarily been confined to, three months' paper. The act of the legislature, passed soon after the adoption of the constitution—in fact at the first session thereafter—though not obligatory if it violates the constitution, is entitled to serious consideration as a legislative construction of the above <sup>291</sup> provision of the constitution, and, unless it is clear beyond reasonable doubt that it is in conflict with the constitution, it is the duty of the court to sustain it.

It is said in *Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep. 73, in reference to the constitutionality of the above statute, that "it is also said to be a correct rule in constitutional interpretation to construe it, not according to its technical meaning, but according to the acceptance of those who adopted it. . . . It must be presumed that it was framed and adopted in the light and understanding of prior and existing laws, and with reference to them. . . . The statute of 12 Anne provided, in substance, that no person should take, directly or indirectly, for loan of money, etc., interest at a higher rate than five per cent per annum; and that all contracts whereby there was reserved or agreed to be paid interest at a higher rate should be utterly void. The question came before the court of common pleas under this statute, and Sir William Blackstone conceived that interest may as lawfully be received beforehand for forbearing, as after the term is expired for having forborne: *Lloyd v. Williams*, 2 W. Black. 792." And this was followed in *Auriol v. Thomas*, 2 Term. Rep. 52; *Marsh v. Martindale*, 3 Bos. & P. 154, and *Floyer v. Edwards*, 1 Cowp. 112. But "no shift will enable a man to take more than legal interest upon a loan."

So it is settled in our state that it is not usury, under our present constitution, to take interest in advance, and that the above act is valid, "so far as it relates to transactions of a commercial kind in short time paper." It is said, in the opinion in *Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep.



73, that, "although this relaxation against the prohibition of usury was first sanctioned in the transactions of banks and other corporations organized to make discount, a distinction could not be made against individuals, and it became universal": Citing 3 Parsons on <sup>222</sup> Contracts, \*131; *Maine Bank v. Butts*, 9 Mass. 49; *Marsh v. Martindale*, 3 Bos. & P. 154; *New York Firemen Ins. Co. v. Ely*, 2 Cow. 703; *Cole v. Lockhart*, 2 Ind. 631; *Parker v. Cousins*, 2 Gratt. 373; 44 Am. Dec. 388.

In the case of *Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep. 73, it is also said that "the clause of the constitution is no broader in its terms, and seems to reach no further in its purpose, than the act of 1838, the act of 12 Anne, or the acts of the other states, upon the subject. The framers of the constitution intended only to make the prohibition against usury, as it had formerly been understood, a part of the organic law, and not leave it to depend on the discretion of the legislature, or the chances of party ascendancy. Such being the purpose of the constitution, and such the meaning given statutes embodying its terms, by previous judicial construction, it follows that it will receive the same construction placed upon the similar statutes. This conclusion receives support in the fact that the legislature, meeting very soon after its adoption, dominated by the purpose that controlled in its adoption, and charged with the duty of carrying it into effect, enacted the statute referred to."

We have quoted largely from the above case because we consider it a well-considered and sound opinion, throwing much light on the question under consideration here, supported, as we find it to be, by the numerous cases referred to in it. It will be observed that the opinion is confined to "short time paper" and in "transactions of a commercial kind."

The opinion does not undertake to define "transactions of a commercial kind in short time paper," because it was unnecessary, for the paper was unquestionably of that kind in that case, being three months' paper—a negotiable promissory note. The statute above quoted uses the term "commercial paper," and the note in the case at bar was commercial paper—a negotiable promissory <sup>222</sup> note, payable in twelve months from its date, for two thousand five hundred dollars, and the interest, two hundred and fifty dollars, was taken out in advance, and only two thousand two hundred and fifty dol-

lars paid to the borrower. Now, if this transaction was not usurious by reason of the length of time the note, out of which the interest was taken in advance, had to run, it was not usurious. This is the only possible question in the case. In the following cases taking interest at the highest legal rate in advance on six months' paper was held not to be usurious, viz: *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Bloomer v. McInerney*, 80 Hun, 201. In the following cases the taking of the highest legal rate of interest in advance on one year paper was held not to be usurious, viz: *Cole v. Lockhart*, 2 Ind. 631; *Mitchell v. Lyman*, 77 Ill. 525; *McGill v. Ware*, 4 Scam. 21. In the following cases the highest legal rate of interest was reserved in advance on paper having from twenty-three months to five years to run, and this is held not to be usurious, viz: *Fleckner v. Bank of United States*, 8 Wheat. 338 (twenty-three months); *English v. Smock*, 34 Ind. 116; 7 Am. Rep. 215 (semi-annually in advance for five years); *Brown v. Scottish-American Mortgage Co.*, 110 Ill. 235 (semi-annually in advance for five years). See, also, *Hoyt v. Pawtucket Inst. etc.*, 110 Ill. 390; *Bacchus v. Moreau*, 7 Rob. (La.) 539 (semi-annually in advance for five years).

In *McGill v. Ware*, 4 Scam. 21, the court, after reviewing the cases in England and America upon this question, said: "I have reviewed these decisions to show that the first impression of the courts was that it was usurious to take interest in advance, as evidenced by the first *dicta* and decisions; and also that the courts very early decided it was not usury under the statutes of Henry VIII, and have followed up that decision uniformly down to this period, under all the English and American statutes. Such a long course of uniform decisions for upwards of two hundred years ought to settle the question; more particularly so with us, as <sup>294</sup> those decisions were made upon statutes precisely like our own as to the mode of reserving interest, and which were known before its passage. . . . If the question were now new, and the business of the country not so deeply involved in transactions of the kind before named, I believe it would be differently ruled." The note discounted in that case had one year to run, and interest at the highest legal rate was taken out in advance, and, yielding to authority, the court held that it was not usury. The proof in the case at bar tends to show that it is customary, in the vicinity where this note was executed, to pay debts in the fall or winter season, when the

proceeds of the cotton crop can be realized; and that notes for the payment of money are made in reference to this, for convenience of trade. And it may be supposed that the business of the country is largely involved by reason of this custom, which, in our judgment, ought not to be ignored in this opinion.

In *Fleckner v. Bank of the United States*, 8 Wheat. 339, a note to the bank, dated the 26th of March, 1818, payable the 1st of March, 1820, was discounted for the full term it had to run by taking out, or reserving in advance, the interest at the highest legal rate allowed by law, and it was held that this was not usury. In discussing the question Judge Story, who delivered the opinion of the court, said: "If a transaction of this sort is to be deemed usurious the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal." He also said, in substance, that taking interest in advance is not usury in bankers or others.

It is so well settled that we deem it unnecessary to cite the numerous cases to show that it is the consensus of judicial opinion that it is not usury for a bank to discount commercial paper in the usual course of business by taking out the interest in advance, at the highest <sup>305</sup> legal rate, even in the absence of a statute allowing it; this being the universal custom, which has grown into law, and in reference to which the provision of our constitution upon the subject of usury is presumed to have been framed and adopted.

There are numerous decisions of courts of last resort in other states of the union which, in effect, hold that there is no distinction to be taken between discounting paper used in commercial transactions, whether it has a long or a short time to run.

In the early cases in England, discounting paper in advance was held to be usurious, without regard to the time it had to run; and the right to do so grew out of the custom of banks in commercial transactions, for the convenience of trade. The banks confined their discounts to paper having from thirty to ninety and sometimes one hundred and twenty days to run; but it seems that, as the commercial transactions became more extended and numerous, and the necessities and convenience of different localities demanded, the custom widened and expanded to meet the growing and ever changing conditions of commerce and trade. As is shown

by many decided cases in other states, the custom of discounting commercial paper having a year, and even more, to run was clearly recognized, and such transactions were held not to be usurious where the highest legal rate of interest was taken in advance before the adoption of our constitution. As our constitution was adopted before this question had arisen in our state, or in this court, it is not a harsh presumption that the provision of the constitution above quoted was framed and adopted in reference to a custom well established in other states, and recognized as not in violation of laws similar to our own upon the subject of usury. It must be understood that the legislature thought so when the act above quoted was passed. It <sup>226</sup> cannot be presumed that the legislature intended to override the constitution.

It is easy to perceive the policy that might have controlled the legislature in passing the act quoted. Our people were an agricultural people almost exclusively. They were engaged in the production chiefly of cotton, the great staple of the south, which, as the proof shows, is marketed in the fall and winter seasons, and they were in the habit of making their obligations to fall due at a time of the year when they could realize upon their crops. Their general custom was to make their notes and obligations for the payment of money to become due in the fall and winter, and for the additional reason that it is more convenient and less troublesome to the borrower to borrow money on twelve months' time, and pay the interest in advance, than to borrow on three months' time, and renew every three months for twelve months, and have the interest taken out at each renewal in advance. It may reasonably be supposed that a consideration of the convenience and the saving of trouble to the borrower by making long time paper, and paying interest in advance, and the fact that this was held in other states not to be usurious, under laws similar to our own upon the subject of usury, influenced the legislature to provide that this might be done in discounting any commercial paper.

Commercial paper is defined to be "bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money which, by their form and on their face, purport to be such instruments as are by the law merchant recognized as falling under the designation of commercial paper": Black's Law Dictionary, 226, "Commer-

cial Paper." The note in this case falls within this definition and within the above act of the legislature.

<sup>297</sup> In discussing the question whether it is usurious to take in advance the highest legal rate of interest in discounting commercial paper, Judge Brewer said, in *Tholen v. Duffy*, 7 Kan. 408: "It seems difficult upon principle to sustain such a transaction. But, in cases where note or bill is given, it is supported by such an overwhelming current of decision, and is a matter of such universal practice, that it may well be considered as ingrafted upon the law as a settled rule." And he added: "It was so settled before the passage of our interest law; and, if the legislature had intended to change this rule of construction, such intention would have been plainly expressed." The same may be said substantially in reference to the custom of discounting negotiable or commercial paper having one year to run by taking out the highest legal rate of interest in advance, as affected by our constitution. The custom was well established before our present constitution was adopted.

It will be observed that some of the cases cited in *Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep. 73, to sustain the position that it is not usury to take out in advance the highest legal rate of interest on discounting three-months paper, equally sustain the position that it does not constitute usury to so discount commercial paper having six months or a year to run.

The only question decided in *Hogan v. Hensley*, 22 Ark. 413, was that a bond given to an internal improvement commissioner, contracting to pay interest at the rate of ten per cent semi-annually in advance, was not negotiable or commercial paper, and that the agreement was usurious and void. This was the question in that case. The case at bar is entirely different, for there can be no dispute that the note in this case is negotiable paper governed by the law merchant.

The rule laid down in the American and English cases is that there must be a corrupt agreement by some <sup>298</sup> device or shift to take or reserve a greater rate of interest than is allowed by law, and that payment or receipt of usurious interest is *prima facie* evidence of a corrupt agreement: *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678.

The note in this case was drawn by the appellee, or at her instance, by her attorney, payable twelve months after date,

to bear interest at the rate of ten per cent per annum after maturity only, and was presented to the bank for discount, and was discounted by the bank, for her convenience, by taking out the highest legal rate of interest in advance.

We find that there is no evidence of a corrupt agreement in this case; that the transaction was in accord with a custom well established before our constitution was adopted, and with the act of the legislature. We therefore hold that the taking or reserving of the highest legal rate of interest in advance on negotiable paper having twelve months to run is not usurious.

The decree in this case is reversed, and the cause is remanded to the circuit court, with directions to enter a decree for the foreclosure of the mortgage.

MR. JUSTICE BOTTLE dissented, declaring that in his opinion the taking of the highest rate of interest in advance was necessarily usurious, because "the lender received interest on the whole of his principal for the use of part only," and though the decision had established an exception in the case of short time negotiable instruments, such exception did not extend to an instrument like that in question in this case.

#### Usury. What Transactions are Usurious.

*Form of the Transaction is Not Material.*—Whether in any case a transaction is infected by usury is a question of fact to be determined by the jury, or the court performing like functions, after taking into consideration in connection with the evidence the statutory or common-law definitions of usury. The mere form of the transaction is immaterial, or, more accurately speaking, it is the substance of the transaction which must be considered, and, if in substance it is of the character denounced by law, the parties cannot be exempted from the penalties imposed by the fact that they have put the transaction in an innocent form, one of which, were it to be judged by form alone, no usury could be affirmed. The desire of lenders to receive more reward than permitted by law, and the willingness of borrowers to concede whatever may be demanded, or to promise whatever may be exacted, to obtain temporary relief from financial embarrassment, have resulted in an infinite variety of devices in an effort to realize, what the law forbids without submitting to the penalties it imposes. The evidence of indebtedness or promise of payment may, on its face, be restricted to the rate of interest allowed by law, or may not require the payment of any interest whatever, but the amount named as principal may be in excess of the sum loaned and such excess may be due to the allowance of illegal interest: *Drury v. Wolf*, 134 Ill. 294; *Kemmitt v. Adamson*, 44 Minn. 121; or the loan may have been of a depreciated kind of currency and the promise be to pay in a more valuable one: *Collins v. Secreth*, 7 T. B. Mon. 335; *Gates v. Hackethal*, 57 Ill. 534; 11 Am. Rep. 45; *Pratt v. Adams*, 7 Paige, 615; or there may be a formal sale of property by the real borrower with an agreement to purchase and to pay a higher price or to take a lease and to pay an annual or other rent: *Tillar v. Cleveland*, 47 Ark. 287; *Starkweather v. Prince*, 1 MoAr. 144; *Phelps v.*

*Bellows*, 53 Vt. 539; or an agreement to pay commissions for services rendered or for exchange, and still the transaction be usurious. It is not to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and, if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings: *Lowe v. Walter*, Doug. 736; *Quackenbos v. Sayer*, 62 N. Y. 346; *Doe v. Barnard*, 1 Esp. 11; *Kelley v. Lewis*, 4 W. Va. 456; *Smith v. Cross*, 90 N. Y. 549; *Chapman v. Clark*, 5 Mackey, 527; *Grider v. Driver*, 46 Ark. 50; *Cousins v. Grey*, 60 Tex. 346; *Wetter v. Hurdesty*, 16 Md. 11; *Tyson v. Rickard*, 3 Har. & J. 109; 5 Am. Dec. 424; *McAlister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651; *Tardiveau v. Smith*, Hardin, 175; 3 Am. Dec. 727; *Morgan v. Schermerhorn*, 1 Paige, 544; 19 Am. Dec. 449; *Barr v. Collier*, 54 Ala. 39; *Wright v. McAlexander*, 11 Ala. 236; *Greenhow v. Harris*, 6 Munf. 472; 8 Am. Dec. 751; *Buttrick v. Harris*, 1 Biss. 442; *Fiedler v. Darrin*, 50 N. Y. 437; *Dowell v. Vannoy*, 3 Dev. 43; *Rhodes v. Fullenwider*, 3 Ired. 415. It will not be possible, however, though the evidence reveals the whole transaction and its true character, to draw a correct conclusion without first ascertaining the tests proper to be applied to distinguish a usurious transaction from one which is not, and therefore some definitions and some specifications of the essential elements of usury are essential.

*Definitions and Tests.*—We shall not attempt to give local or statutory definitions. It is doubtless within the constitutional authority of the different state legislatures, providing they do not impair the freedom of the parties to contract, to define usury; and some of them have formulated definitions somewhat different from that of the early English statutes constituting a part of our common law. Our attention will be restricted to the common-law definition and to the decisions applying it. According to Blackstone, usury is an “unlawful contract for a loan of money to receive the same again with exorbitant interest”: 4 Blackstone’s Commentaries, 156. It is defined by Bouvier as being an “illegal profit which is required and received by a lender of a sum of money from the borrower for its use.” These definitions, whether accurate or not, do not wholly supply the tests desired for the purpose of determining whether a given transaction is usurious. These tests can best be ascertained and illustrated by an inquiry for the elements of a usurious contract. They are four, to wit: 1. There must be a loan or a forbearance; 2. The loan must be of money or of some thing circulating as money; 3. It must be repayable absolutely; and 4. Some thing must be exacted for its use in excess of, and in addition to, the exaction allowed by law. The presence of these four elements infallibly indicates usury irrespective of the form in which the parties have put the transaction, and, on the other hand, the absence of any one of them conclusively refutes the claim that the parties have been guilty of any usurious practice.

*Intent of the Parties.*—There are decisions implying that to the elements just mentioned must be added a fifth, consisting of the intent of the parties, or, at least of the lender, that illegal interest shall be paid and received. Thus it has been said that “the intent to take and reserve more than legal interest for a loan of money or the forbearance of a debt must exist, and this is deduced from the relation of the parties, their acts contemporaneous with or subsequent to the contract, and all attendant circumstances”:

*Falls v. United States etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194, 208; *Uhlfelder v. Carter*, 64 Ala. 527. It has been held that where the borrower was guilty of usurious intent of which the lender was ignorant, that the transaction was not usurious: *Otto v. Durege*, 14 Wis. 571; but that, on the other hand, the innocence of the borrower cannot shield a lender who is himself aware of the usurious nature of the transaction: *First Nat. Bank v. Plankington*, 27 Wis. 182; 9 Am. Rep. 453. "Where there is a direct loan, and more than legal interest is secured for the forbearance of payment, the usury is complete, and can only be rebutted by proof of a mistake in the calculation of interest; and, in general, when a profit is made, or a loss imposed, on the necessities of a borrower; whatever form, shape, or disguise the treaty for a loan may assume, and the capital is to be returned at all events, it has been adjudged to be so much profit upon the loan and a violation of the laws which limit the lender to a specific rate of interest. In construing the usury laws, however, the uniform rule is, that there must be an intention knowingly to contract for, and to take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement. This intent, when the contract is not usurious on its face, must be gathered from the circumstances of the case—such as the situation and object of the parties at the time of the loan, the character and use to be made of the funds loaned or article transferred, and the time, manner, and place of payment": *Ely v. McOlung*, 4 Port. 136.

This dwelling upon the subject of intent in the decision cited is well calculated to mislead, for it implies that, though a transaction embraces all the elements of usury, still it may be declared to be nonusurious because of some innocence or simplicity on the part of one or both of the parties. Certainly, in the borrowing and loaning of money all the actors are presumed, as in other transactions, to know the law, and are not entitled to escape its penalties by proof of their ignorance or of the absence in them of any actual intention to be wicked or to treat the law with disrespect. The consideration of the intent of the parties is necessary only in cases where they have attempted to conceal it, and have given the transaction an outward form which is innocent, while they have pursued an object which is unlawful. If, however, their purpose is forbidden, the intent of the parties, or of either of them, cannot make it innocent nor exempt them from the penalties prescribed by the law. The purpose for which the intent of the parties, or of either of them, can be considered is best stated in the following extract from the opinion of the court of appeals of New York: "It is true the intent is essential to constitute the offense of usury; but the intent must be deduced from and determined by the acts. The intent which enters into and is essential to constitute usury is simply the intent to take and reserve more than seven per cent per annum for the loan and forbearance of money." One cannot avoid the consequences of an act by testifying that he did not intend to take usury, "that is, he intended to give the transaction a different name from that which the law gives it, and call that a purchase and sale which the law calls a loan of money, secured by a mortgage. The voluntary taking or reservation of a greater interest or compensation for the loan or forbearance of money than that allowed by law, is *per se*, usurious; but, if taken by mistake or accident, it is not usury. If the party intends to take and receive the amount paid the law condemns the act, if it is within the condemnation of the law against usury": *Fiedler v. Darrin*, 50 N. Y. 443.

On the other hand, it has been said that "It is the intention of the par-



ties, not the form employed, which fixes its character. If it were otherwise, every species of fraud, oppression, and wrong might be perpetrated with perfect impunity. Hence in trials of questions of usury, it has ever been held that no device intended to cover up the real character of the transaction can avail to defeat the statute": *Cooper v. Nock*, 27 Ill. 301. So it has been said that "Usury is a mere matter of intention": *Gale v. Grannis*, 9 Ind. 142; and that "It is the intent of the parties that taints the contract with usury, and not the mere words in which that contract is expressed": *Daniels v. Mowry*, 1 R. I. 164; and that "To constitute usury there must be an intention to take more than legal interest. Whenever such intention appears in the taking more it is evidence of the corrupt agreement required by the statute; though the party may never have heard of the law, or may think that he is steering quite clear of it. The ignorance or mistake of law excuses no man; but a mistake of fact it excuses. A miscalculation innocently committed, or the mistake of a scrivener in putting one sum for another, will never charge a party with usury": *Childers v. Deane*, 4 Rand. 410; and that "It is of the essence of a usurious transaction that there shall be an unlawful and corrupt intent on the part of the lender to take illegal interest, and so we must find before we can pronounce the transaction to be usurious": *Condit v. Baldwin*, 21 N. Y. 219; 78 Am. Dec. 137; and that "On a question of usury it is the view, the intention of the parties, which gives character to the transaction, and no matter what the form where the real truth and substance is a loan of money—a lending on one side and a borrowing on the other at more than an interest of six per cent per annum—no shift or device can take it out of the act of assembly": *Tyson v. Richard*, 3 Har. & J. 114; 5 Am. Dec. 424. If there be any variance in these expressions of opinion, each was undoubtedly correct as a rule of decision applicable to the facts before the court, and from all we deduce the following as to the true meaning of the courts in speaking of the question of intent as being controlling in controversies respecting alleged usury: 1. That, when the form of the transaction is innocent, evidence may be received to show its real nature, and to justify a court or jury in finding that the parties intended a transaction usurious in substance; 2. That when the transaction is usurious in substance, whether so in form or not, the penalties imposed by law cannot be evaded by proof that the parties had no evil design, unless it be further shown that the party against whom usury is alleged intended to act innocently, and not to make any charge in excess of that sanctioned by law, and by some mistake, as by an incorrect computation, he contracted to receive in excess of the legal interest, intending only to contract for and receive the latter. This exception would seem to be somewhat dangerous, because it may tempt a party confronted with a probability of suffering a penalty to seek escape under cover of an alleged mistake which probably never existed. Still the authorities are nearly or quite unanimous in affirming that where a note is discounted or is given in settlement of a previous indebtedness, and the sum charged for the discount in the one case or added to the original indebtedness in the other is greater than could result from a charge of legal interest, evidence may be received for the purpose of showing that a computation was attempted to be made according to the legal rate of interest, and that the excess actually charged was attributable to an error in computation innocently made, and such evidence, if sufficient to convince the jury, or court sitting as a jury, of the absence of intention to take unlawful interest, entitles the innocent party to exemption from the penalties of usury: *Brown v. Cass County Bank*, 86

Iowa, 527; *Smythe v. Allen*, 67 Miss. 146; *Bank of Utica v. Smalley*, 2 Cow. 770; 14 Am. Dec. 526; *New York Firemen Ins. Co. v. Ely*, 2 Cow. 678; *Bank of Utica v. Wager*, 2 Cow. 712; *Gibson v. Stearns*, 3 N. H. 185; *Livingston v. Bird*, 1 Root, 303; *Duwall v. Farmers' Bank*, 7 Gill & J. 60. If the transaction was by the borrower supposed and intended to be usurious, but was by the lender intended and supposed not to be so, as he is the party who would suffer any penalty that might be imposed, the transaction must be regarded as innocent: *Jackson v. Travis*, 42 Minn. 438. As mere intention, except in the case of a mistake to which we have referred, cannot change the character of a transaction necessarily usurious, neither can it taint with usury a transaction necessarily innocent. Hence where "a transaction was simply a purchase of business paper, and there was no actual violation of the usury laws, the presence or absence of an intention to violate them was entirely immaterial": *Smith v. Paton*, 31 N. Y. 66.

*The First Element of a Usurious Transaction is*, as we have already shown, that there be a borrowing and a lending, for, if there be neither, the agreement to pay interest in excess of that specified by the statute is not usury: *Tardeveau v. Smith*, Hardin, 175; 3 Am. Dec. 727; *McFarland v. State Bank*, 4 Ark. 44; 37 Am. Dec. 761; unless such statute has given some definition of usury inconsistent with that of the common law, as where it has provided that all agreements to pay interest above a designated rate shall be deemed usurious, whether arising out of a loan of money or not.

*Sales and Purchases.*—If a man has property, whether real or personal, which another wishes to purchase, the former has a perfect right to name the price upon which he is willing to sell, and to refuse to accede to any other. He may offer to sell at a designated price for payments at once, or at a much higher price if payment is to be postponed to some day in the future, and the difference between the two prices, if regarded as interest on money loaned, may be so great as to prove that the rate of computation is much in excess of that permitted in the statute against usury. In such case, unless the buying and selling is a mere pretense, there is no borrowing nor lending. The vendor, being the owner of his property, may legally refuse to part with it except upon the terms he has named, and if the purchaser prefers to purchase on credit, and to agree to pay the higher price, the substance of the transaction is that the owner of the property has exchanged it for a promise to pay a sum of money or an obligation payable in the future, and because of the absence of any borrowing or lending, there can be no usury: *Ellenbogen v. Griffey*, 55 Ark. 268; *Brooks v. Avery*, 4 N. Y. 225; *Hogg v. Ruffner*, 1 Black, 115; *Myers v. Williams*, 85 Va. 629; *Bute v. Brogood*, 7 Barn. & C. 453. Nor is it material that the agreement for the purchase price in the future, instead of specifying the whole sum then to be paid, names a particular sum as principal, and declares that it shall draw interest at a rate which, were the transaction a borrowing and lending, would clearly be usurious: *Cutler v. Wright*, 22 N. Y. 472, 482; *Toucey v. Robinson*, 1 Met. (Ky.) 663; *Graeme v. Adams*, 23 Gratt. 225; 14 Am. Rep. 130; *Kraker v. Shields*, 20 Gratt. 377; *Reger v. O'Neal*, 33 W. Va. 159; *Garity v. Cripp*, 4 Baxt. 86; *Bank v. Mann*, 94 Tenn. 17; *Brown v. Gardner*, 4 Lea, 145; *Hansbrough v. Peck*, 5 Wall. 507; *Swayne v. Ridlle*, 37 W. Va. 251; *Ellenbogen v. Griffey*, 55 Ark. 268; *Dykes v. Bottoms*, 101 Ala. 390.

*There may be Other Transactions than those of Purchase and Sale* which may result in agreements to pay a higher rate of interest than is allowed where there is a borrowing and lending. Thus, a person willing to contract to do a piece of work of any character—such, for instance, as the construction

of a building—may, as a part of the original agreement, stipulate that the deferred payments shall bear interest in excess of that allowed to a lender of money: *Graeme v. Adams*, 23 Gratt. 225; 14 Am. Rep. 130. From these decisions there is a vigorous dissent by those courts which can see in a contract to pay interest on the balance of the purchase price of real or personal property nothing but a lending of money: *Thompson v. Nesbit*, 2 Rich. 75; *Compton v. Compton*, 5 La. Ann. 630; *Mitchell v. Griffith*, 22 Mo. 515; *Seo-field v. McNaught*, 52 Ga. 69; *Irvin v. Mathews*, 75 Ga. 739; *Evans v. Negley*, 13 Serg. & R. 218; *Hartranft v. Uhlinger*, 115 Pa. St. 270. Many other cases sometimes cited in confirmation of this view are founded upon statutes by virtue of which all agreements for the payment of interest are placed upon the same footing, and no discrimination is made in favor of those not founded upon a borrowing or lending of money: *Torrey v. Grant*, 10 Smedes & M. 89; *Purchman v. McKinney*, 12 Smedes & M. 631; *Fisher v. Hoover*, 3 Tex. Civ. App. 81; *Crawford v. Johnson*, 11 Ind. 258; *Newkirk v. Burson*, 21 Ind. 129.

The thing sold or given in exchange for obligations bearing more than the legal rate of interest may be a chose in action, though, because of the danger of false pretenses and other devices to evade the laws against usury is greatest with respect to property of this class, such a transfer may be viewed with suspicion, increasing the difficulty of convincing a court or jury of its good faith. Thus, if the purchase of an annuity is made, and, as a result of the transfer, the seller receives a higher rate of interest than is allowed by law, whether the transaction is usurious or not does not depend wholly on the rate of interest, but on the further question whether the annuity was raised "with a design of covering a loan": *Lloyd v. Scott*, 4 Pet. 205. Similar principles apply to other transfers of obligations for the payment of money when the amount paid by the purchaser must result, in the event of the subsequent discharge of the obligation, in his receiving a profit on his investment in excess of that which he is permitted to receive for the loan of an equal amount of money. A party having a bond, and desiring to raise money upon it, offered it to another, who agreed that he would buy it, provided he could make at the rate of twelve per cent a year upon his money, and obtain security for the final payment of the bond. Such security having been procured, the bond was purchased at a price permitting the realization of the profit desired by the purchaser. When it was subsequently claimed that this transaction was usurious the court said: "If it was made *bona fide* for the sale and purchase of the bond, although at a discount which would insure twelve per cent a year for the money advanced, it would not be usurious. If, on the other hand, the sale of the bond was a mere cover for the purpose of evading the statute against usury, and the real intention of the parties was to make a contract for the loan of money at a higher rate of interest than six per cent, then the contract was usurious": *Moncure v. Dermott*, 13 Pet. 345, 355.

Unless the Discounting of Promissory Notes is by statute declared to be usurious if at a greater rate of interest than permitted by law there is little or no doubt that they, like other property, may be bought and sold on such terms as the vendor and purchaser may agree upon, and, however small the price paid, the transfer is not usurious if in good faith, and not a mere attempt to disguise a borrowing and lending of money: *Cobb v. Titus*, 10 N. Y. 198; *Rice v. Mather*, 3 Wend. 62; *Siewert v. Hamel*, 91 N. Y. 199; *Moseley v. Brown*, 76 Va. 419; *Donnington v. Meeker*, 11 N. J. Eq. 362; *Orchard v. School Dist.*, 14 Neb. 378; *Harick v. Jones*, 4 McCord 402; *Cram v. Hend-*

*ricks*, 7 Wend. 569; *Capital City Ins. Co. v. Quinn*, 73 Ala. 558; *Shackleford v. Morris*, 1 J. J. Marsh. 497; *Metcalf v. Pilcher*, 6 B. Mon. 529; *Holmes v. Williams*, 10 Paige, 326; 40 Am. Dec. 250; *Bailey v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385; *Judy v. Gerard*, 4 McLean, 360; *Lafayette Bank v. State Bank*, 4 McLean, 208; *Wycoff v. Longhead*, 2 Dall. 92; *Byrne v. Grayson*, 15 La. Ann. 457; *Colehour v. State Savings Inst.*, 90 Ill. 152; *Alabama etc. Ins. Co. v. Hall*, 58 Ala. 1; *Newell v. National Bank*, 12 Bush, 57; *Lloyd v. Keach*, 2 Conn. 175; 7 Am. Dec. 256; *Munn v. Commission Co.*, 15 Johns. 44; 8 Am. Dec. 219; *Ramsay v. Clark*, 4 Humph. 244; 40 Am. Dec. 645; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652; *Crump v. Nicholas*, 5 Leigh, 251.

*Accommodation Paper.*—To come within the protection of rule last stated it is essential that the transaction be in reality one of purchase and sale, and there cannot be a purchase and sale unless, independently of the transaction in question, the note or other chose in action already had a legal existence, or the parties thereto have estopped themselves from disproving such existence. Until the note has been delivered it has no legal efficacy. Hence a maker cannot sell his own note, nor can it be sold for him to any one who has notice that it has never been delivered. Otherwise the payee instead of purporting to receive the note in consideration of a loan would always purport to purchase it for a price stated. If the note is made for the purpose of being put on the market for sale, never having been delivered to a *bona fide* payee, and is then sold, it has no legal efficacy prior to such sale, for until then no consideration has been paid for it and there has been no person entitled to enforce it. The transaction is a mere sham to cover the borrowing of money. If the purchaser knows that the note has never been delivered, or the circumstances are such as to put him upon inquiry, there is no doubt that, if his purchase or discounting is based upon an excessive rate of interest, the transaction is usurious: *Zabriskie v. Spielman*, 46 N. J. L. 35; *Van Schaack v. Stafford*, 12 Pick. 565. If, on the other hand, he has neither knowledge nor notice of the real facts, and believes that the note or other chose in action is being sold to him by one to whom it has previously been delivered and who is the true owner, the purchaser ought not to be chargeable with usury, for he has neither guilty knowledge nor guilty intent. There are, however, two general rules or principles often enunciated in the decisions upon the subject of usury which bear strongly against him. They are: 1. "That where a note is charged with usury at its birth, when it becomes legally efficient, so as to give the lender a right of action upon it, no subsequent holder for a valuable consideration, without notice of such usury, may maintain suit upon it": *Sauerwein v. Brunner*, 1 Har. & G. 482; and 2. "That before a bill can be discounted it must be a perfect and available bill, and "that, if a bill or note be made for the purpose of raising money upon it, and it is discounted at a higher premium than the legal rate of interest, and where none of the parties whose names are in it can, as between themselves, maintain a suit on the bill when it becomes mature, provided it has not been discounted, that then such discounting of the bill would be usurious, and the bill would be void": *Munn v. Commission Co.*, 15 Johns. 55; 8 Am. Dec. 223. Hence the numerous decisions holding that when accommodation paper is delivered to the accommodation payee, a purchaser from him at usurious rates of discount, though acting in good faith and without notice, is not protected against a plea of usury: *Sauerwein v. Brunner*, 1 Har. & G. 477; *Cockey v. Forrest*, 3 Gill. & J. 483; *Flemming v. Mulligan*, 2 McCord, 173; 13 Am. Dec. 707; *Carlisle v. Hill*, 16 Ala. 398; *Whitten v. Hayden*, 7 Allen, 407;

*Kendall v. Robertson*, 12 Cuah. 156; *Williams v. Banks*, 11 Md. 198; *Corcoran v. Powers*, 6 Ohio St. 10; *Clark v. Sisson*, 22 N. Y. 312; *Newell v. Doty*, 33 N. Y. 85; *Simpson v. Fullenoider*, 12 Ired. 334; *Eastman v. Shaw*, 65 N. Y. 522; *Clayfin v. Boorum*, 122 N. Y. 385; *Ruffin v. Armstrong*, 2 Hawks, 411; 11 Am. Dec. 774. There may, even within the principles of these decisions, arise an estoppel against urging the defense of usury, as where the person selling the note represents that it is good business paper, or makes any other express representation which he must necessarily disprove before maintaining this defense, and the person purchasing the note relies upon the representation so made: *Dowe v. Schutt*, 2 Denio, 621; *Chamberlain v. Townsend*, 7 Abb. Pr. 31; 26 Barb. 611. It appears to us that even in this class of cases there may be estoppel by conduct as well as by express representation, and that one who signs a note for the accommodation of another and delivers it to him, knowing that he will make some use of it for his special benefit, thereby authorizes him to represent that it is good business paper, and further, that the offering it for sale and selling it by the payee amounts to a representation on his part, binding both on him and the accommodation maker, that the note has a legal and efficient existence and may be sold and purchased as such, and therefore estops both as against a *bona fide* purchaser of it, though at a rate of discount in excess of the legal interest, from maintaining that the transaction was, as to such purchaser, a mere loaning of money and therefore subject to the laws against usury. This is the conclusion sustained by the weight of authority upon the subject: *Holmes v. Williams*, 10 Paige, 326; 40 Am. Dec. 250; *Byrne v. Grayson*, 15 La. Ann. 457; *Middletown Bank v. Jerome*, 18 Conn. 443; *Gaul v. Willis*, 26 Pa. St. 259; *Moseley v. Brown*, 76 Va. 419; *Hansbrough v. Baylor*, 2 Munf. 36; *Brummel v. Anders*, 18 Gratt. 873; *Holmes v. Hobson*, 8 Humph. 127; *Ramsay v. Clark*, 4 Humph. 244; 40 Am. Dec. 645; *Dickerman v. Day*, 31 Iowa, 444; 7 Am. Rep. 158; *Otto v. Durege*, 14 Wis. 571; *Whitworth v. Adams*, 5 Rand. 333; *Sherman v. Blackman*, 24 Ill. 347; *Jackson v. Travis*, 42 Minn. 438.

There are, however, statutes which, in effect, make usurious discounting of notes, and where such is the case, the purchasing of a note may, as well as the direct loan of money, be within the penalties of the statute if the profit stipulated for or realized is in excess of that allowed by law: *Bank of Chillicothe v. Swayne*, 8 Ohio, 257; 32 Am. Dec. 707; *Planters' Bank v. Sharp*, 4 Smedes & M. 75; 43 Am. Dec. 470; *Russell v. Faylor*, 1 Ohio St. 327; 59 Am. Dec. 631; *Gebhart v. Sorrele*, 9 Ohio St. 461.

*The National Banking Law* places Discounts and Loans on the Same Footing and imposes the same penalty for a charge either of discount or of interest greater than allowed by law: U. S. Rev. Stat., secs. 5197, 5198. This penalty is the forfeiture of the entire interest in the case of a loan and the entire discount in the case of a purchase. There has been some attempt to limit the effect of these statutes by making a distinction between a discounting and a purchasing of a note or other chose in action, and it has been insisted that the discounting was merely a loaning of money and a taking of interest in advance, and hence, that the statute in question did not apply to purchasers. This attempt has not met with success: *National Bank v. Johnson*, 104 U. S. 271; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Pape v. Capitol Bank*, 20 Kan. 440; 27 Am. Rep. 183; *Danforth v. National State Bank*, 3 U. S. App. 7; *National Bank v. Carpenter*, 52 N. J. L. 165.

Whatever we have said respecting the purchasing of choses in action or

other property, and the realizing of profit in excess of that permissible upon loans of money, must always be understood as referring to a transaction that is really what it purports to be, and not one which is innocent in form, but unlawful in substance and purpose. Furthermore, where the purpose of one of the parties is proper and of the other improper, the former, to be entitled to immunity from the penalty of usury, must not only have acted in actual good faith, but must also not have neglected to make inquiries, the propriety of which must have been obvious to a man of ordinary prudence. If a note payable to the order of its maker is indorsed by him in blank, and offered for sale by his servant or agent, and there is nothing to indicate that it is the property of the latter, or that it has ever been delivered to any person, it is the duty of the intending purchaser to make some inquiry, and, failing to do so, he cannot successfully claim that his purchase of the note was other than a loan of money: *Sylvester v. Swan*, 5 Allen, 134; 81 Am. Dec. 734.

So there may be an actual sale of property in which the vendor parts with, and the vendee acquires, title, and which must, nevertheless, be deemed a usurious transaction, if the object of the vendor was to gain usurious interest upon his money. Thus, where an application was made for a loan of money to a party, who stated that he did not have the money, but that he had certain railroad bonds, and that he would have some money at about the 1st of April following. Thereupon the applicant for the loan stated that his finances were in such a condition that he could not hold out until the time named, and that if he could get some of those railroad bonds he could borrow money upon them, and that he would procure a bond and mortgage from his father as security. The parties then separated, and it was ascertained that a loan could be procured with the bonds as collateral. The bonds having a face value of five thousand dollars, and an actual value of a little over four thousand dollars, were sold to the applicant for the loan for five thousand three hundred and seventy-five dollars, and in payment of them a bond and mortgage were executed. Default having been made in the payment of the bond, a suit of foreclosure was commenced in which the defense of usury was interposed. In sustaining this defense the court said that the sole question was whether the transaction was a *bona fide* sale of the bonds at an exorbitant rate, "or a loan of money under the guise and color of sale of choses in action by which the lender reserved and secured to himself a greater rate of interest than that allowed by law. The transaction must be judged by its real character, rather than by the form and color which the parties have seen fit to give it. The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise, but none have been allowed to prevail. Courts have been astute at getting at the true intent of the parties and giving effect to the statute. The device of the present appellant is not novel." From all the circumstances the court was of opinion that, as the urgency of the application for a loan was known to the plaintiff, and he also knew "that the applicant did not want, and had no means of purchasing, choses in action or railroad bonds, and could only take them as a substitute for, and as a means of, raising money, and could not and did not keep them twenty-four hours, but hypothecated them at eighty cents on the dollar for money to meet present necessities, first giving the bond and mortgage in suit at a premium of seven and a half per cent per annum," the plea of usury must be sustained: *Quackenbos v. Sayer*, 62 N. Y. 344.

*Forbearance, Extacting Excessive Interest for.*—Though the original borrowing and lending were not usurious, yet the transactions between the parties at a subsequent time may be infected with usury. Thus, the loan may be due or about to become due, or for any other cause the debtor may desire that the time of payment stipulated in the original note, or other obligation, be extended beyond the date of maturity therein specified. If, to obtain such extension, he pays any thing in addition to the lawful rate of interest, or enters into any new agreement stipulating for a higher rate than he is allowed by law on the original loan, the transaction is usurious; *Graeme v. Adams*, 23 Gratt. 225; 14 Am. Rep. 130; *Krause v. Pope*, 78 Tex. 478; *Kendig v. Linn*, 47 Iowa, 62; *Cobb v. Morgan*, 83 N. C. 211; *Willie v. Green*, 2 N. H. 333; *Leonard v. Patton*, 106 Ill. 99; *First Nat. Bank of Galeburg v. Davis*, 108 Ill. 633; *Rosebrough v. Ansley*, 35 Ohio St. 107; *Rosa v. Doggett*, 8 Neb. 48; *Erwin v. Lowry*, 2 La. Ann. 314; 46 Am. Dec. 545; *Gates v. Hackethal*, 57 Ill. 534; 11 Am. Rep. 45; *Shirley v. Welby*, 19 Ill. 623; 71 Am. Dec. 244; *Culph v. Phillips*, 17 Ind. 209; *Ferrier v. Scott*, 17 Iowa, 578; *McAlister v. Jerman*, 32 Miss. 142. It was said, however, that though the new obligation thus taken, and which amounts to an extension of time for payment of the debt, is usurious, and cannot itself be enforced, yet that it does not affect the original transaction, and therefore it may be disregarded and a suit maintained upon the note or obligation first taken; *Humphrey v. McCauley*, 55 Ark. 143.

*Second, the Loan Must be of Money.*—This statement does not at first seem consistent with the language of the statute of 12 Anne, which has formed the basis of nearly all other statutes upon the subject. This act forbade that any person should thereafter take directly or indirectly for the loan of money, wares, merchandise, or other commodities whatever, above the value of five pounds for the forbearance of one hundred pounds for one year or more for that rate, for a greater or less sum, or for a longer or shorter time. But it will be seen that the interest mentioned in this statute was to be collected upon a sum of money, and therefore it has been held that, if the loan is of any chattels, it cannot come within the statute, unless those chattels are estimated as being worth a specified sum of money, and the promise to repay is to pay in chattels which, at the time of payment, shall be equal in value to the chattels loaned at the time of the loan, together with a sum added thereto which must be in excess of the legal rate of interest. As we shall hereafter see, it is one of the essential elements of usury that the lender shall, beyond all question, be a gainer by the transaction; or, in other words, that the sum which he has loaned shall be repayable absolutely, together with usurious interest. Hence, if a man were to loan corn or livestock of the value of one hundred pounds, to be repaid within a year with other corn or livestock of the value of one hundred and ten pounds, the transaction would necessarily be usurious, because there could be no question that the lender must gain more than five pounds upon the hundred. If, on the other hand, the loan is of a hundred bushels of corn, or of one hundred head of sheep, for which, at the end of the year, one hundred and ten bushels of corn, or one hundred and ten head of sheep, are to be paid, he may lose, though the promise of payment is performed, because the larger quantity or number of grain or sheep at the time of payment may be less valuable than was the smaller quantity or number at the time of the loan. Hence, the decisions under statutes similar in form to that of Anne agree that the loan of chattels to be repaid in chattels of like character, though of greater number or quantity, cannot be usurious, if, owing to fluctuations in value, it may hap-

pen that the number or quantity to be repaid may be of less value at the time of payment than were the chattels loaned at the time of the loan: *Oummings v. Williams*, 4 Wend. 679; *Hall v. Haggart*, 17 Wend. 280; *First Nat. Bank v. Owen*, 23 Iowa, 185; *Dry Dock Bank v. American etc. T. Co.*, 3 N. Y. 344; *Bull v. Rice*, 5 N. Y. 315; *Spencer v. Tilden*, 5 Cow. 144; *Holmes v. Wetmore*, 5 Cow. 149; *Hamlin v. Fitch*, Kirby, 260; *Morrison v. McKinnon*, 12 Fla. 552, 559; *Easterlin v. Rylander*, 59 Ga. 292. In some of the states statutes defining usury have omitted the words "wares, merchandise, and other commodities" mentioned in the statute of Anne, and where this is the case there can be no question, independently of the authorities already cited, that a transaction cannot be usurious unless the loan is for money: *Marshall v. Rice*, 85 Tenn. 502.

*The Third Essential is that the Principal Sum Loaned shall be Repayable Absolutely:* *Long v. Wharton*, 3 Keb. 304; *Beddingfield v. Ashley*, Cro. Eliz. 741; *Dowdall v. Lenox*, 2 Edw. Ch. 267. If it is payable upon some contingency which may not happen, and which really exposes the lender to the hazard of losing his loan, then the transaction is not usurious, though the interest reserved is in excess of that allowed by law, as where one loans money upon a ship on such conditions that if it is lost within three years he is to lose such money: *Thorndike v. Stone*, 11 Pick. 183; or stipulates that the loan need not be repaid until "United Pipe Line certificates are worth in the open market \$1.15 per barrel": *Truby v. Mosgrove*, 118 Pa. St. 89; 4 Am. St. Rep. 575. The contingency selected may be so improbable as to convince the court or the jury that there was no real hazard, and that the repayment of the loan was made subject to the improbable contingency merely to escape the statute against usury. Where such is the case the transaction will be treated as usurious: *Burton's case*, 5 Rep. 70; *Mason v. Abdy*, 3 Salk. 390; *Button v. Downham*, Cro. Eliz. 643; *Pike v. Ledwell*, 5 Esp. 164; *Dowdall v. Lenox*, 2 Edw. Ch. 267; *Colton v. Dunham*, 2 Paige, 267. It has been said not to be "necessary that the agreement be to repay in money": 27 Am. & Eng. Ency. of Law, 925. This must, however, be understood, in connection with what we have said in the preceding paragraph, to wit: that a transaction cannot be usurious if, as its result, the lender may not be a gainer. If, for a loan of one hundred pounds, the borrower were to agree to repay at the end of a year in property or services to be of a value greater than one hundred and five pounds, the transaction would be usurious under the statute of Anne, for the lender must make an unlawful profit, but if, in return for such a loan, the borrower were to agree to repay in specified property or services which might, at the time of payment, be of less value than one hundred pounds, the transaction would not be usurious, because the lender might lose, rather than gain, thereby. There are, it is true, some American decisions involving stipulations on the part of a borrower to repay the principal in specified property, or to pay for the use of the principal in specified services, and which, because of the great value of the property or services, resulted in decisions declaring the transactions in question to be usurious: *Lindley v. Sharp*, 7 T. B. Mon. 248; *Woodard v. Fitzpatrick*, 9 Dana, 121; *Thorpe v. Ricks*, 1 Dev. & B. Eq. 613; *Hamer v. Harrell*, 2 Stew. & P. 323; *McGinnis v. Hart*, 4 Bibb, 327; *Richardson v. Brown*, 3 Bibb, 207; but we are persuaded that these decisions were due to the belief, on the part of the court, that the parties were not acting in good faith, and were attempting to put in an innocent form dealings by which they intended to accomplish a guilty object. All persons must be at liberty to sell their property or their ser-



prices at such prices as to them shall seem proper and expedient, and certainly the transaction is not dependent for its validity upon the question whether it turns out that the purchaser realizes a greater profit than he was permitted to stipulate for on a loan of money.

*The Fourth and Last Essential is that Some Thing must be Exacted for the Use of a Loan* in excess of what is allowed by law. If the contract of the parties is that the borrower shall pay a certain amount of interest, a mere inspection of the statutes of the state will determine whether the amount to be gained by the loan is such as to render it usurious or not. It is undoubtedly advantageous to the lender to have his interest in advance, or to have it payable at frequent intervals, and compounded, if such payment is not made, and hence the question has arisen whether he can exact these advantages without offending against the law of usury.

*Interest Payable at Frequently Recurring Periods.*—The interest specified in these statutes is usually designated as a certain rate per annum. This has never, so far as we are aware, been considered either as forbidding loans for a short period of time, nor as requiring that interest shall be computed at yearly intervals only. On the contrary, it is well settled that interest may be made payable semi-annually, or quarterly, or at such recurring periods as may receive the assent of the parties: *Goodrich v. Reynolds*, 31 Ill. 490; 83 Am. Dec. 240; *Cook v. Courtright*, 40 Ohio St. 248; 48 Am. Rep. 681; *Tallman v. Trudell*, 3 Wis. 443; *Mowry v. Shumway*, 44 Conn. 493; *Mowry v. Bishop*, 5 Paige, 98; *Hawley v. Howell*, 60 Iowa, 79; *Meyer v. Muscatine*, 1 Wall. 384; *Ragan v. Day*, 46 Iowa, 239; *Barnes v. Worlich*, Cro. Jac. 25; *Brown v. Vandyke*, 8 N. J. Eq. 798; 55 Am. Dec. 250; *Hatch v. Douglas*, 48 Conn. 116; 40 Am. Rep. 154.

*Interest in Advance.*—There has been some question whether a paying, or agreeing to pay, interest in advance is not usurious, and some judicial intimation that it is so in principle, and, that if it is to be permitted, it must be confined to commercial paper falling due within a comparatively short time: *Hogan v. Hensley*, 22 Ark. 413; *Insurance Co. v. Carpenter*, 40 Ohio St. 260. There is, however, no doubt that interest may be received in advance, or that the lender may stipulate for its payment at certain periods in advance, and that the transaction cannot be deemed usurious because part or all of the interest to accrue upon the note before its maturity is paid, or agreed to be paid, in advance: *Flecker v. United States Bank*, 8 Wheat. 338; *Lloyd v. Williams*, 2 W. Black. 792; *Auriol v. Thomas*, 2 Term Rep. 52; *Marsh v. Martindale*, 3 Bos. & P. 154; *Vahlberg v. Keaton*, 61 Ark. 534; 14 Am. St. Rep. 73; *English v. Smock*, 34 Ind. 115; 7 Am. Rep. 215; *Mackenzie v. Flannery*, 90 Ga. 590; *Telford v. Garrels*, 31 Ill. App. 441; *Maxwell v. Willitt*, 49 Ill. App. 564; *Fowler v. Equitable Trust Co.*, 141 U. S. 384; *National Bank v. Smoot*, 2 McAr. 371; *Telford v. Garrels*, 132 Ill. 550; *Parker v. Cousins*, 2 Gratt. 372; 44 Am. Dec. 338; *Bank of Newport v. Cook*, 60 Ark. 288; ante, p. 171; *Bank of Utica v. Phillips*, 3 Wend. 408; *Stubbling v. Bank*, 5 Rand. 132; *Ticinic Bank v. Johnson*, 31 Me. 414; *Manhattan Co. v. Osgood*, 15 Johns. 162; *New York etc. Ins. Co. v. Sturges*, 2 Cow. 664; *State Bank v. Hunter*, 1 Dev. 100; *Thornton v. Bank of Washington*, 3 Pet. 40; *Rose v. Munford*, 36 Neb. 148; *McGill v. Ware*, 4 Scam. 21. The computation of interest in advance may, however, be upon such basis as to render the transaction usurious, as where the borrower is charged interest at the rate of ninety days for a quarter of a year: *Bank of Utica v. Wager*, 8 Cow. 398; *Utica Ins. Co. v. Tilman*, 1 Wend. 556; except where, by statute or the decisions of the courts, this mode of computation is per-

missible. Generally, the use of Rowlett's Tables in computation, by which a month is deemed to contain but thirty days, and a year but three hundred and sixty days, is treated as innocent, unless it appears that an intent existed to exact usurious interest: *Planters' Bank v. Snodgrass*, 4 How. (Miss.) 573; *Parker v. Cousins*, 2 Gratt. 372; 44 Am. Dec. 388; *Agricultural Bank v. Bissell*, 12 Pick. 586; *Planters' Bank v. Bass*, 2 La. Ann. 430. The fact that interest is payable before the borrower receives the money is not necessarily conclusive evidence of usury. If the money is ready for him, and his failure to receive it is due to his own act or neglect, the transaction is lawful: *Rose v. Munford*, 36 Neb. 148. If, on the other hand, the note has been antedated for the purpose of entitling the lender to a greater profit than the law allows him for the time it is used by the borrower, the transaction is usurious: *Williams v. Williams*, 15 N. J. L. 255.

*Compound Interest.*—If interest is not paid when due it is then a debt of substantially the same nature as the principal, and, for a forbearance to enforce its immediate payment, the debtor may agree to pay lawful interest upon it. Agreements after interest has become due that interest shall thereafter be paid upon it: *Hager v. Blake*, 16 Neb. 12; *Fuls v. Davis*, 26 Gratt. 903; *Craig v. McCulloch*, 20 W. Va. 148; *Pindall v. Bank of Marietta*, 10 Leigh, 481; as well as stipulations in notes or other writings that, if the interest therein agreed to be paid is not paid when due, that it shall become a part of the principal and bear like interest are not forbidden by the laws against usury: *Columbia Co. v. King*, 13 Fla. 451; *Scott v. Saffold*, 37 Ga. 384; *Fitzhugh v. McPherson*, 3 Gill. 408; *Quimby v. Cook*, 10 Allen, 32; *Hale v. Hale*, 1 Coldw. 233; 78 Am. Dec. 490; *Forbes v. Cantfield*, 3 Ohio, 18; *Hawley v. Howell*, 60 Iowa, 79; *Case v. Fish*, 58 Wis. 56; *Ginn v. New England etc. Co.*, 92 Ala. 135; *Bowman v. Neely*, 151 Ill. 37; *Telford v. Garrela*, 31 Ill. App. 441; *Telford v. Garrela*, 132 Ill. 550; *Gilmore v. Bissell*, 124 Ill. 488; *Gilmore v. Bissell*, 24 Ill. App. 481; *Stewart v. Petree*, 55 N. Y. 621; 14 Am. Rep. 352; *Oliver v. Decatur*, 4 Cranch C. C. 461; *Pinckard v. Ponder*, 6 Ga. 253; *Taylor v. Hiestand*, 46 Ohio St. 345; *Lewis v. Paschal*, 37 Tex. 319; *Bledsoe v. Nixon*, 69 N. C. 89; 12 Am. Rep. 642; *Woods v. Rankin*, 2 Heisk. 46. Upon each of these topics there is some contrariety of judicial opinion. If interest has already become due, there is no question that the debtor is under a present obligation to pay it, and that he may, on a settlement, either pay it in money or give a new interest-bearing obligation for the interest alone or for the amount of his debt with the accrued interest: *McGovern v. Union etc. Co.*, 109 Ill. 151; *Brown v. Brent*, 1 Hen. & M. 3; *Young v. Hill*, 67 N. Y. 162; 23 Am. Rep. 99; *Dickson v. Surginer*, 3 Brev. 417; *Barbour v. Tompkins*, 31 W. Va. 410; *Hager v. Blake*, 16 Neb. 12; *Stewart v. Petree*, 55 N. Y. 621; 14 Am. Rep. 352; *Wallis v. Lehman*, 36 Ark. 569; *Grunder v. Driver*, 46 Ark. 50; *Keiser v. Decker*, 29 Neb. 92. If interest has been for some time in default it is evident that the borrower has not done as he agreed to do, and that some injury may have resulted to the lender on that account, and the latter as a condition for further forbearance may insist that interest shall be paid upon the interest then in default from the time it became due according to the terms of the note or other obligation. If, however, there has been no agreement to pay interest upon interest, there is no legal obligation to do so existing against the borrower, and, if the lender exacts it, he receives more than he is in law entitled to. Some of the decisions affirm that the borrower is under a moral obligation to pay interest on the interest which he failed to pay when it became due, and, therefore, if he chooses to recognize this obligation and to pay such interest on interest or to give-

a new note of which it is a part of the consideration, that the transaction is not usurious nor without a sufficient consideration to support it: *Camp v. Bates*, 11 Conn. 487; *Dyar v. Slingerland*, 24 Minn. 267; *Gilmore v. Bissell*, 124 Ill. 488; *Telford v. Garrele*, 132 Ill. 554. The better opinion, in our judgment, is, that, after interest has become due, any agreement attempting to allow or provide for the payment of interest upon it for any part of the time it has been in default and prior to the making of the agreement, must be regarded either as usurious or as not being supported by any valid consideration, and, therefore, as nonenforceable: *Stansbury v. Stansbury*, 24 W. Va. 634; *Krause v. Pope*, 78 Tex. 478; *Young v. Hill*, 67 N. Y. 162; 23 Am. Rep. 99; *Ward v. Brandon*, 1 Heisk. 490; *Banks v. McClellan*, 24 Md. 82; 87 Am. Dec. 594. While the decisions all concede that an agreement after interest has become due that it shall thereafter bear interest as consideration of the forbearance to enforce payment, is neither usurious nor without consideration, many of the courts refuse to enforce agreements made in advance of such default to pay interest upon interest. These decisions do not rest upon the ground that the agreement in the note or other instrument that the interest therein stipulated for shall be compounded if not paid when it shall become due is usurious, but, rather, upon the ground that it is against public policy to enforce such an agreement. They do not declare the instrument void or otherwise subject to the penalties of usury, but they do refuse to award interest upon interest: *Van Benschooten v. Lawson*, 6 Johns. Ch. 313; 10 Am. Dec. 333; *Young v. Hill*, 67 N. Y. 162; 23 Am. Rep. 99; *Hochmark v. Richler*, 16 Col. 263; *Quackenbush v. Leonard*, 9 Paige, 334; *Ross v. Munford*, 36 Neb. 148; *Mathews v. Toogood*, 23 Neb. 536; 8 Am. St. Rep. 141; *Henry v. Flagg*, 13 Met. 64. Some of the cases undertake to make a distinction between an agreement to compound interest and an agreement to compound it if it shall not be paid at the time agreed upon, and, while refusing to enforce agreements of the former character, concede full effect to those of the latter: *Cox v. Brookshire*, 76 N. C. 314; *Bledsoe v. Nixon*, 69 N. C. 89; 12 Am. Rep. 642.

*Parol Agreements.* — The note or other obligation taken by the lender may not stipulate for illegal interest, and yet the loan may have been induced by a contemporaneous parol agreement for such interest, and the question will probably arise whether a note innocent on its face can be shown to be usurious by parol evidence. There are a few decisions affirming that it can, or, more properly speaking, that a parol promise which accompanied and was in the minds of the parties a portion of the transaction, can be proved for the purpose of establishing its usurious character: *Atwood v. Whitesey*, 2 Root, 87; *Willard v. Reeder*, 2 McCord, 369; *Morton v. Rutherford*, 18 Wis. 296. Of course there are many instances in which usury may be established by parol evidence, as where the evidence tends to prove either the actual payment of usury for the purpose of procuring the loan or forbearance, or that a note was antedated, or that a separate written obligation given by the borrower to the lender represented interest agreed to be paid by the former to the latter in excess of the rate permitted by law: *Wood v. Cuthbertson*, 3 Dak. 328; *Clark v. Badgley*, 8 N. J. L. 233; *Glison v. Newton*, 1 Hayw. (N. C.) 336; 1 Am. Dec. 559. But, where the promise is by parol, a written obligation cannot be rendered usurious by evidence of it. In such a case the usury can be established only by evidence of the actual reception by the lender of the excessive interest: *Koehler v. Dodge*, 31 Neb. 328; 28 Am. St. Rep. 518; *Stein v. Swensen*, 44 Minn. 218; *Butterfield v. Kidder*, 8 Pick. 512; *Allen v. Turnham*, 83 Ala. 323; *Van Beil v.*

*Fordney*, 79 Ala. 76; and in some instances this alone is not sufficient for such payments, especially if pursuant to a promise of the debtor made after the original loan, and being therefore without consideration, may be regarded merely as amounts for which he is entitled to be credited in any final or other settlement between him and his creditor: *Van Beil v. Fordney*, 79 Ala. 76; *Allen v. Turnham*, 83 Ala. 323.

**PENALTIES—Agreement to Pay Must be Absolute.**—The sum paid or agreed to be paid in excess of legal interest must be for the use or forbearance of a loan, and the contract between the borrower and the lender must be such that the former has not the privilege of relieving himself from payment by the doing of some act which he has reserved to himself a right to do by the terms of his agreement. "Where, by the terms of a contract, the party can discharge himself by paying the real amount due, the transaction is not obnoxious to the statute against usury": *Lawrence v. Cowles*, 13 Ill. 579. "For, wherever the debtor by the terms of the contract can avoid the payment of the larger by the payment of the smaller sum at an earlier day, the contract is not usurious, but conditional, and the larger sum becomes a mere penalty. To constitute usury the obligation to pay more than the legal rate must be absolute upon the face of the transaction": *Moore v. Hylton*, 1 Dev. Eq. 433. The cases presenting this question have usually involved transactions in which the borrower has agreed to pay a rate of interest not forbidden by law, but has stipulated that, in the event of his not making payment at the time specified, then that the obligation shall bear a higher rate of interest, either from such default or from the date of its execution, or that some specific sum shall be paid in addition to the principal and interest stipulated for. In these cases, if the borrower can make the payment at the time he has agreed to make it, he can exonerate himself from the payment of the additional sum, or from the liability to have his obligation bear a higher rate of interest before or after its maturity, as the case may be. The transaction, therefore, is not necessarily usurious, but may be shown to be so by any evidence sufficient to satisfy the jury, or the court performing the functions of a jury, that the real object of the parties was to secure usurious interest. The additional sum or interest may be regarded as a penalty inserted in the agreement for the purpose of inducing a prompt and faithful compliance with its terms by the borrower, in which event it is clearly not usurious, or it may not have been intended for this purpose, but may be stipulated for upon the express or implied understanding that the borrower will make default and thus subject himself to the payment of the penalty, in which event it is necessarily usurious. The fact that the obligation is made payable very soon after it is entered into, and at a time when there was no reasonable anticipation that the debtor would be able to make such payment and to thus avoid the penalty, naturally gives rise to the suspicion that it was not the prompt payment of the loan, but the additional penalty, which was the object of the stipulation. If, as a result of the whole transaction, its object appears to have been to obtain a profit in excess of that allowed by law, it must be pronounced usurious: *Santer v. Smith*, 89 Ill. 123; 31 Am. Rep. 70; *Carroll County Sav. Bank v. Strother*, 28 S. C. 504; *Pike v. Crist*, 62 Ill. 461; *Osborn v. McCowen*, 25 Ill. 218. If, on the other hand, it appears to have been a penalty designed to procure prompt compliance with the agreement or obligation, it must be held not to be usurious; and this is the view which has been taken of transactions of this character in

instance in which they have been presented for judicial con-

sideration: *Cutler v. How*, 8 Mass. 257; *Gower v. Carter*, 3 Iowa, 244; 66 Am. Dec. 71; *Horn v. Nash*, 1 Iowa, 204; 63 Am. Dec. 437; *Rogers v. Sample*, 33 Miss. 310; 69 Am. Dec. 349; *Fisher v. Anderson*, 25 Iowa, 28; 95 Am. Dec. 761; *Osborn v. McCowen*, 25 Ill. 218; *Gambriel v. Rose*, 8 Blackf. 140; 44 Am. Dec. 760; *Lloyd v. Scott*, 4 Pet. 223; *Muckenzie v. Flannery*, 90 Ga. 590; *Ramsey v. Morrison*, 39 N. J. L. 591; *Weyrich v. Hubelman*, 14 Neb. 432; *Bass v. Patterson*, 68 Miss. 310; 24 Am. St. Rep. 279; *Upton v. O'Donahue*, 32 Neb. 565; *Burton's case*, 5 Rep. 68; *Folger v. Edwards*, 1 Cowp. 112; *Garnet v. Ferot*, 1 Camp. 133; *Gould v. Bishop Hill Colony*, 35 Ill. 324; *Downey v. Beach*, 78 Ill. 53; *Fisher v. Otis*, 3 Pin. 78; *Call v. Scott*, 4 Call, 402; *Wilson v. Dean*, 10 Iowa, 432; *Moore v. Hylton*, 1 Dev. Eq. 429; *Campbell v. Shields*, 6 Leigh, 517; *Conrad v. Gibbon*, 29 Iowa, 120. *Contra*, *Carroll County Sav. Bank v. Strother*, 28 S. C. 504. There are decisions which refuse to give effect to agreements of the character here in question, not upon the ground that they are usurious, but because, in the opinion of the court, they undertake to fix and liquidate the damages to result from the breach of a contract in cases where the law does not permit such liquidation, but restricts the parties to the damages actually suffered, or to such as are presumed by law to flow from such a breach: *Mason v. Cullender*, 2 Minn. 350; 72 Am. Dec. 102; *Fugua v. Curriel*, Minor, 170; 12 Am. Dec. 46; *Martin v. Lennon*, 19 Minn. 73.

In some of the states the practice of exacting an agreement that, in the event of the nonpayment of an obligation at its maturity, it shall bear a rate of interest in excess of that allowed by law, has attracted legislative attention and condemnation, and resulted in statutes forbidding agreements of this character by declaring them to be usurious: *Barton v. Farmers' Nat. Bank*, 122 Ill. 355.

*Expenses of Collections.*—Within the principle that a penalty or exaction from which a borrower may relieve himself by performing his agreement to repay the loan at the time stipulated is not usurious fall all agreements to pay the expenses of collection in the event of default in the note or other obligation. It is an almost universal practice to insert stipulations in mortgages of real or personal property that in the event of a default in the payment of the principal or interest, giving rise to a suit for foreclosure, the creditor shall be entitled to recover as costs of such suit his reasonable attorney's fees, which are sometimes designated and sometimes left to be fixed by the court; and, even when no mortgage or other security is taken, the note or other obligation given by the borrower often provides for the recovery of some percentage or other amount to pay the attorney's fees of the lender in any suit he may have brought. Such stipulations and all others, the object of which is merely to secure the creditor from loss by reason of the default of the debtor and the consequent resort to legal proceedings with the resulting expenditures, are not usurious: *Weatherby v. Smith*, 30 Iowa, 131; 6 Am. Rep. 663; *Bank of Commerce v. Fuqua*, 11 Mont. 285; 23 Am. St. Rep. 461; *Williams v. Flowers*, 90 Ala. 136; 24 Am. St. Rep. 772; *Munter v. Linn*, 61 Ala. 492; *Miner v. Paris Exchange Bank*, 53 Tex. 559; *Churchman v. Martin*, 54 Ind. 380; *Billingsley v. Dean*, 11 Ind. 331; 34 Am. St. Rep. 99; *Mutzenbaugh v. Troup*, 36 Ill. App. 261; *Dorsey v. Wolff*, 142 Ill. 589; *Farmer's etc. Bank v. Barton*, 21 Ill. App. 403; *Smith v. Silvers*, 32 Ind. 321; *Guar v. Louisville etc. Co.*, 11 Bush, 180; 21 Am. Rep. 209; *First Nat. Bank v. Canatsey*, 34 Ind. 149; *Athens Nat. Bank v. Danforth*, 80 Ga. 55; *Hableman v. Massachusetts etc. Ins. Co.*, 120 Ill. 390; *Barton v. Farmers' etc. Bank*, 122 Ill. 352; *Shelton v. Aultman etc. Co.*, 82 Ala. 315; *Duluth etc. Co. v. Klordahl*, 55 Minn. 341; *Johnston H. Co. v. Clark*, 30 Minn. 308.

*Contingent Right to Excessive Interest or Profit.*—The cases to which we have referred, asserting that a penalty or additional sum in excess of legal interest exacted of the borrower under certain contingencies which he may avoid by not making default in his obligation are not usurious, must not be understood as applying to other contingencies in which such excess may become due from him, and the happening or nonhappening of which is not within his control. If a lender has stipulated for the highest rate of interest, and has also exacted a further stipulation that upon the happening of a specified contingency, though its occurrence may be uncertain, he shall have some other thing of value, yet if he, whether the contingency happens or not, is entitled to the principal of his loan and such interest as may accrue upon it, the exaction of the additional stipulation which may result to his benefit is usurious: *Browne v. Vredenburg*, 43 N. Y. 195.

*There are Numerous Charges to which a Borrower may be Subjected*, and the result of which is that his loan will cost him a sum in excess of the highest legal rate of interest, which are not usurious, although he cannot, even by his repayment of the loan at the time and in the manner agreed upon, relieve himself therefrom. Chief among these are expenses properly attendant upon the loan. The lender is under no obligation to bear these or any part of them. Thus, if security is taken for the repayment of the loan, due business precaution will demand that an examination of the title of the intending borrower be made, and that counsel, learned in the law, be employed to advise the lender whether or not the title disclosed by such examination is perfect or imperfect, and also respecting the form of the security to be taken. The lender may refuse to entertain an application for a loan unless the expenses incurred for these purposes are paid, or agreed to be paid, by the borrower, and their payment by the latter does not render the transaction usurious: *Goodwin v. Bishop*, 145 Ill. 421; *Ellenbogen v. Grifey*, 55 Ark. 268; *Daley v. Minnesota etc. Co.*, 43 Minn. 517; *Humphrey v. McCauley*, 55 Ark. 143; *White v. Dwyer*, 31 N. J. Eq. 40; *Dayton v. Moore*, 30 N. J. Eq. 543. So, if the lender has performed, or agreed to perform, any service for the borrower which is a proper subject for compensation, the latter may agree to compensate it, and such compensation may be in the form of interest in excess of that allowed by law where the only transaction between the parties is a mere borrowing and lending of money: *Bridges v. Sheldon*, 18 Blatch. 507. Where it is claimed that a sum has been paid, or agreed to be paid, to a lender for expenses incurred or services rendered by him, whether the transaction is usurious is a question to be determined from the peculiar facts of each particular case. If the services or expenses are shams, or such as, according to the usual course of business are, or ought to be, rendered without compensation, or if the compensation exacted is wholly disproportionate to the services rendered or the expenses incurred, the conclusion is warranted that the attempt to compensate them is nothing more nor less than an attempt to conceal a usurious intention. If, on the other hand, no such intention appears the transaction is innocent: *Swanstrom v. Baletad*, 51 Minn. 276, though the services are such as the lender ought ordinarily to perform for himself. Thus if, when applied to for a loan, he is not then able to make it because he has not the requisite funds on hand, and he explains that he can obtain them by making certain exertions or sacrifices which he would not otherwise make, and the applicant for the loan thereupon agrees to reimburse the lender if he will make such exertion or sacrifice, the agreement is not usurious, though the borrower is also to pay for the loan the highest rate of interest allowed by law. Hence he may

agree to pay such expenses as the lender will incur in raising the money for the purpose of making the loan: *Atlanta etc. Co. v. Goyer*, 48 Ga. 11; *Baton v. Alger*, 2 Abb. App. Dec. 5; *Kiley v. Olin*, 82 Ga. 312. As illustrations of charges which may be made by and for the benefit of the lender, and the effect of which may be to make the loan cost the borrower a sum in excess of the legal rate of interest without rendering the transaction usurious, may be mentioned the following: A commission charged for accepting and paying drafts where it is "a reasonable compensation for the expense and trouble in negotiating the business in relation to the drafts": *Trotter v. Curtis*, 19 Johns. 160; 10 Am. Dec. 211; a stipulation in favor of a commission merchant to loan money to a dealer in produce and other commodities to enable him to carry on his business in consideration that the commission merchant shall have the privilege of the care, management, and sale of such commodities, and the commissions ordinarily allowed for such services: *Matthews v. Coe*, 70 N. Y. 239; 26 Am. Rep. 583; a guaranty of credit, in consideration that the person whose credit was guaranteed should pay a commission to his guarantor of two and one-half per cent upon the amount of the advances guaranteed: *More v. Howland*, 4 Denio, 264, 268; an agreement that a person should take a conveyance of property, pay all claims existing against it, and reconvey it upon the repayment of his advances in twelve annual installments, and should receive as compensation for his services the sum of one thousand dollars: *Myers v. Williams*, 85 Va. 621; a charge of a commission for becoming an accommodation indorser: *Kitchel v. Schenck*, 29 N. Y. 515; an agreement between a farmer and a cotton broker whereby the latter advanced money to raise a crop, on condition that in addition to the interest to be paid him he was to have the right to sell such cotton as might be raised by the farmer, or, in default thereof, was to be allowed the usual and customary broker's commissions on such bales as he should fail to ship: *Blackburn v. Hayes*, 59 Ark. 366; a similar agreement between a commission merchant in Baltimore and a pork-packer in Peoria by which the former advanced moneys to the latter to be repaid with interest, and reserved the right to a commission on the products which the pork-packer would ship to him, and also a like commission on that part of those products which were not sent to the commission merchant for sale: *Cockle v. Flack*, 93 U. S. 344; a bonus received by an agent for indorsing the note given by the borrower: *Davis v. Sloman*, 27 Neb. 877; an agreement between a commission merchant and a grain dealer that moneys should be advanced by the former to the latter for which he should pay interest, and also that he should pay the merchant a stated sum as commissions for all grain purchased with the money borrowed, whether the borrower sold the grain through the commission merchant or elsewhere: *Morrissey v. Broomal*, 37 Neb. 766. So the lender may stipulate that in addition to the highest legal rate of interest he shall be allowed a certain sum as exchange where the money has to be brought from or sent to some particular place and the exchange merely represents the expense incurred or to be incurred in making such transmission. "The question in every such case depends entirely upon the fact whether the exchange is stipulated for with a corrupt intent to evade the statute against usury and to really get more interest than the law allows to be taken by calling it an exchange." Where this latter purpose is the real one, the transaction is usurious, and where, on the other hand, the stipulation for exchange is made in good faith and to cover necessary expense without any usurious intent the transaction is innocent: *Cornell v. Barnes*, 26 Wis. 473; *Buckingham v. McLean*, 13 How.

151, 171; *Andrews v. Pond*, 13 Pet. 65, 80; *Merritt v. Benton*, 10 Wend. 117  
*Lee v. Walbridge*, 19 N. Y. 134, 137, 142; *Riley v. Olin*, 82 Ga. 312.

*Exactions for Services not Rendered to the Borrower.*—In all of the cases to which we have referred supporting agreements by which a lender is to be allowed some thing in excess of the legal interest, the principle underlying the decisions is, that the extra allowance was not for the use of the money or the forbearance to enforce an obligation, but was for some service to the advantage of the borrower and which the lender was under no obligation to perform for him. When the exaction does not fall within this principle its reservation or enforcement cannot be treated as innocent for the reason that it cannot fairly be attributed to any other cause than the granting of the loan, and must, therefore, be deemed a profit exacted as a condition precedent to such granting. Hence, if a borrower does, or promises to do, some thing of value to the lender, and this appears to have been a condition precedent to the loan or forbearance and, aside from it, the lender is to receive the highest rate of interest allowable, this extra payment, privilege, or thing of value has the character of a usurious exaction and its effect is the same as if the lender had directly stipulated for the payment of a rate of interest not permitted by the statute. As illustrations of cases falling within this principle we may mention: a loan granted on condition that the borrower shall purchase of the lender a piece of land at an exorbitant price: *Earnest v. Hoskins*, 100 Pa. St. 551; a condition that in addition to the legal interest the lender should receive a number of shares of stock of a corporation: *Holliday v. Lowry B. Co.*, 92 Ga. 675; an agreement between a railway corporation and a national bank for the loan of a large sum of money, accompanied by a verbal stipulation that the borrower should endeavor to secure another railway corporation as a depositor with the bank, and, in the event of the failure to do so, that the bank should have, in lieu of such deposit, two and a half per cent upon the amount loaned in addition to legal interest: *Union Nat. Bank v. Louisville etc. Co.*, 145 Ill. 208; an agreement between an insurance corporation and a borrower that, upon the granting of a loan to him, he should take out a policy of life insurance, the first premium of which should be paid in advance out of the moneys loaned: *National L. Ins. Co. v. Harvey*, 2 McCrary, 576; *Missouri etc. Ins. Co. v. Kittle*, 1 McCrary, 234; an agreement that the borrower will deliver to the lender for storage and sale on commission one bale of cotton for each ten dollars loaned, or pay as liquidated damages one month's storage and the customary charges for selling on the number of bales not delivered, if the parties had no reasonable expectation that the borrower would be able to deliver the stipulated number of bales: *Smith v. Lehman*, 85 Ala. 394; an agreement that the lender in addition to legal interest should be entitled to commissions on the amount of his advances: *Stark v. Sperry*, 6 Lea, 411; 40 Am. Rep. 47; an agreement on the part of a borrower to pay all taxes which might be imposed against the lender upon the money loaned: *Meem v. Dulaney*, 88 Va. 674.

*Commissions Paid to Agents.*—A person desirous of borrowing money may deem it necessary or expedient to secure the services of another to negotiate a loan for him, and may pay, or agree to pay, for such services, and the amount so paid or agreed to be paid, when added to the interest stipulated for, may make the cost of the loan to the borrower greater than the highest legal rate of interest. If, however, the lender does not profit by this, there is no usury in the transaction though he has notice of the fact that a broker or other mediator has been employed and is to be paid for his ser-



vices in effecting the loan. In making payment to such mediator the borrower is compensating his own agent for services rendered to himself, and the compensation thus paid cannot impress the transaction, as between the borrower and the lender, with the taint of usury: *Telford v. Garrels*, 132 Ill. 550; 31 Ill. App. 441; *Holdeman v. Massachusetts etc. Co.*, 120 Ill. 390; *Ballenger v. Bourland*, 89 Ill. 513; 29 Am. Rep. 69; *Fisher v. Porter*, 23 Fed. Rep. 162; *Ginn v. New England etc. Co.*, 92 Ala. 135; *May v. Flint*, 54 Ark. 573; *Baird v. Millinwood*, 51 Ark. 548; *Richardson v. Shattuck*, 57 Ark. 347; *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73; *Merck v. American etc. Co.*, 79 Ga. 213; *Pass v. New England etc. Co.*, 66 Miss. 365; *Ottilie v. Waechter*, 33 Wis. 252; *Baldwin v. Doying*, 114 N. Y. 452; *Philo v. Butterfield*, 3 Neb. 256; *Equitable Mort. Co. v. Craft*, 58 Fed. Rep. 613; *Eddy v. Bagger*, 8 Biss. 238.

Nor is it material that the agent thus employed by the borrower performed some services which might very properly have been performed by the lender or his agent, such as visiting the property and determining its character and value, procuring examinations of title to be made and legal instruments to be drawn and recorded, all of which expenses may be included as part of the charges of the mediator without exposing the lender to the penalties of usury: *Holt v. Kirby*, 57 Ark. 251; *Goodwin v. Bishop*, 50 Ill. App. 145; *Keagy v. Trout*, 85 Va. 390; *Brown v. Brown*, 38 S. C. 173. The fact that the agent of the borrower who negotiated the loan for him and received compensation therefor divided it with an agent of the lender has been held not to render the transaction usurious: *Dickey v. Brown*, 56 Iowa, 426. The effect of the receipt of a bonus or commission by an agent of the lender we shall consider hereafter. The principle governing transactions of this character is that the lender shall not receive for the use of his money a greater profit than allowed in the statute against usury, and, where he knowingly does so, that statute is violated. Hence, if it is a part of the transaction that the mediator shall divide with the lender the commission or other thing of value which is to be given the latter for securing the loan, the transaction is usurious: *Collamer v. Goodrich*, 30 Vt. 628; *McBroom v. Scottish etc. Co.*, 153 U. S. 318; *Fowler v. Equitable etc. Co.*, 141 U. S. 384; *Roberts v. Mathews*, 77 Ga. 458.

If the Person to Whom a Commission or Bonus is Paid is an Agent of the Lender, the question whether such payment can be taken into consideration in determining whether the transaction is usurious depends upon whether or not the lender is to profit directly or indirectly by the transaction. If he does not know that a commission has been, or is agreed to be, paid and has no notice of such facts as impose upon him the duty of inquiry, and he does not knowingly receive any benefit from the commission or bonus, he certainly has no usurious intent, and, having neither usurious intent nor a usurious profit, the cases agree that he is not to be subjected to the penalties of usury: *Palmer v. Call*, 2 McCrary, 522; *Manning v. Young*, 28 N. J. Eq. 568; *Condit v. Baldwin*, 21 N. Y. 219; 78 Am. Dec. 137; *Lane v. Washington etc. Co.*, 46 N. J. Eq. 316; *Cox v. Massachusetts etc. Ins. Co.*, 113 Ill. 382; *Phillips v. MacKellar*, 92 N. Y. 34; *Call v. Palmer*, 116 U. S. 98; *Stillman v. Northrup*, 109 N. Y. 473; *Massachusetts etc. Ins. Co. v. Boggs*, 121 Ill. 119; *Williams v. Bryan*, 68 Tex. 593; *Rogers v. Buckingham*, 33 Conn. 81; *Muir v. Newark Sav. Bank*, 16 N. J. Eq. 537; *Philo v. Butterfield*, 3 Neb. 256; *Lee v. Chadney*, 3 Abb. App. Dec. 43; *Dryfus v. Burnes*, 53 Fed. Rep. 410; *Ballinger v. Bourland*, 87 Ill. 513; 29 Am. Rep. 69; *Stein v. Swensen*, 44 Minn. 218; *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73; *Smith v.*

*Wolf*, 55 Iowa, 555. Where there is an entire innocence and ignorance on the part of the lender it is not material that the person representing him as his agent also occupied a very confidential relation toward him, if, as a matter of fact, he has neither notice of the usurious exaction nor any interest in its proceeds. This rule has been applied where the agent was also the husband of the lender: *Brigham v. Myers*, 51 Iowa, 397; 33 Am. Rep. 140; and where the lender was a banking corporation whose president entered into an agreement in his individual capacity by which he was to secure a commission above the legal rate of interest on a loan made by the corporation, it having nothing to do with the agreement and receiving no part of the money so paid by the borrower as commissions: *Chicago etc. Co. v. Park Nat. Bank*, 145 Ill. 481. This rule was also held applicable where a loan was made by a guardian of a minor and commissions were exacted of the borrower for making it: *Fellows v. Longyor*, 91 N. Y. 324.

*If an Agent of the Lender Performs Services for the Borrower*, the latter may properly pay or agree to pay therefor, and the knowledge of the lender that such services have been rendered and paid, or agreed to be paid for, and that the amount thus paid added to the interest agreed to be paid for the loan will cost the borrower a sum in excess of the highest rate of interest, does not make the transaction usurious when the services for which the agent is compensated are not such as the lender ought to have performed or paid for, and the compensation is not shared, nor agreed to be shared, with the lender: *Hopkins v. Baker*, 2 Pat. & H. 116; *Keagy v. Proust*, 85 Va. 390; *Stein v. Swenson*, 44 Minn. 218.

*Commissions Paid General Agent, or Agent not Compensated by Lender.*—In so far as an agent of the lender represents him and is charged with caring for his interests he performs services for which it is the duty of his principal to compensate him, and if by the ordinary course of business the burden of making such compensation is thrown upon the borrower, who also assumes the burden of paying the highest legal rate of interest, the lender has indirectly received a benefit in excess of that rate and has, in the opinion of the majority of the courts, tainted the transaction with usury. There are, it is true, cases in which it appeared that the lender constituted another his agent for the purpose of loaning moneys with an understanding that such agent should, in some way, compensate himself for his services without resorting to his principal, and in which it was held that the principal was not chargeable with a reasonable exaction made by the agent for his services though it increased the cost of the loan to a sum in excess of the highest legal rate of interest: *Mackey v. Winkler*, 35 Minn. 513; *Acheson v. Chase*, 28 Minn. 211; but even where this rule was applied it was determined that, if the exaction made by the agent was greater than a fair compensation for his services to the borrower and to the lender, the transaction was usurious: *Avery v. Creigh*, 35 Minn. 456. The decided weight of authority is opposed to the right of the lender to cast upon the borrower, though indirectly, the burden of paying the former's agent, and makes the immunity of the lender from the charge of usury, where a bonus has been exacted beyond the legal rate of interest, depend upon his want of notice of this fact. Therefore, whenever the lender when making the loan knows that a bonus or commission is being paid to his agent for services not rendered to the borrower, and that such payment increases the cost of the loan to the borrower beyond the amount allowed by law, the lender, though no part of the moneys so exacted are received by him, is deemed to have been a guilty

participant in a usurious transaction: *Banks v. Flint*, 54 Ark. 40; *Payne v. Newcombe*, 100 Ill. 611; 39 Am. Rep. 69; *Borcheling v. Trefz*, 40 N. J. Eq. 502; *Pfennig v. Scholer*, 43 N. J. Eq. 15. There are decisions which, from the general language employed, support the inference that, whenever a loan is made by an agent of the lender and such charges are exacted as make the transaction usurious, the act of the agent must be treated as the act of his principal, whether the latter knew of the illegal exaction or not: *Cheney v. White*, 5 Neb. 261; 25 Am. Rep. 487; and other decisions taking the more reasonable view that the act of the agent must, at least in the absence of evidence upon the subject, be presumed to have been authorized by his principal: *Stein v. Swenson*, 44 Minn. 218; *McFarland v. Carr*, 16 Wis. 259.

If the agent of the lender acts for him in a single transaction and under such circumstances that his authority must be deemed special and restricted to the making of loans for which no illegal exaction shall be imposed, or if the principal has reason to believe, and does believe, that his agent is acting gratuitously, and not for the purpose of realizing a profit from either of the parties, then, to charge the lender with the consequences of a usurious transaction on the part of the agent, the principal must undoubtedly be proved to have had notice of it. If, on the other hand, the agent is a general agent of the lender for the purpose of making loans, and, whether he is such a general agent or not, if the lender understands that the services to be rendered by the agent are not gratuitous, but are not to be paid for by some person other than the lender, then any exaction made of the borrower by such agent must be regarded either as authorized by his principal from the general nature of the agency, or as done with the knowledge and consent of that principal, because he knew that his agent, for services to be performed for himself, was to be compensated in some manner by some other person not under any duty or obligation to make such compensation, and that such person must inevitably be the borrower: *Sherwood v. Roundtree*, 32 Fed. Rep. 113; *New England etc. Co. v. Hendrickson*, 13 Neb. 157; *Cheney v. Woodruff*, 6 Neb. 151; *Fowler v. Equitable Trust Co.*, 141 U. S. 334; *Adamson v. Wiggins*, 45 Minn. 448; *Vahlberg v. Keaton*, 51 Ark. 534; 14 Am. St. Rep. 73; *Payne v. Newcomb*, 100 Ill. 611; 39 Am. Rep. 69; *McFarland v. Carr*, 16 Wis. 259; *Rogers v. Buckingham*, 33 Conn. 81.

A lender is not chargeable with notice of acts which he did not authorize and the doing of which is not reasonably to be anticipated from the authority conferred. Hence he is not charged with complicity in an unlawful exaction made by a subagent, when he neither knew of nor authorized the employment of subagents by the principal agent: *Scruggs v. Scottish American etc. Co.*, 54 Ark. 566.

The rule that a lender must not receive benefit of any unlawful bonus or commission exacted by his agent, is but an application of the general principle that the lender will not be allowed directly or indirectly to receive a profit upon his loan in addition to that sanctioned by law. Sometimes the real lender pretends to be an agent for another, and, as such, exacts from a borrower compensation for his services in securing the loan or for the doing of some act for which he has no right to charge, or, if he has such right, for which he makes a charge obviously out of all proportion to the services rendered. Every device of this character becomes unavailing when the true nature of the transaction is disclosed. It serves only to subject the guilty lender to the penalties of usury: *Dayton v. Dearholt*, 85 Wis. 151; *Dade v. Spalding*, 52 Minn. 356; *Lukens v. Hazlett*, 37 Minn. 441; *Sanford v. Kane*, 133 Ill. 199; 23 Am. St. Rep. 602.

*If the Agent of a Lender Acts in His own Name*, and without disclosing that he has a principal, and makes a loan to one who believes him to be the principal, and in connection with such loan makes a usurious exaction, the principal seems to be bound by it, whether he had any notice of it or not. The transaction is on its face usurious, and the borrower cannot be deprived of any right or defense which he otherwise has by proving that the transaction was innocent because, contrary to his intention, he has received a loan from an undisclosed and innocent principal: *Trimble v. Thorson*, 80 Iowa, 246; *Wilkes v. Coffield*, 3 Hawks, 28; *Erickson v. Bell*, 53 Iowa, 627; 36 Am. Rep. 246; *contra*, *Hughes v. Griswold*, 82 Ga. 299.

*Building and Loan Associations.*—Associations, usually incorporated, have been formed in the greater portion of the United States, the general plan of which is that their members shall pay a specified sum monthly upon each share of the corporate stock issued to them; that the moneys so paid in shall be loaned to the members; that for the privilege of obtaining such loans they shall pay a certain premium, sometimes fixed by the by-laws of the association, but usually ascertained as the result of bidding therefor; that the loans, if the interest is kept paid, shall stand until the value of the stock held by the borrowing member shall equal the amount of the loan, on the happening of which event it is expected that the stock will be received in payment and cancellation of the loan. The premium paid, or agreed to be paid, by the member receiving a loan, when added to the interest stipulated for, is usually such that the costs of the loan exceed the highest rate of interest allowed by law. Where such is the case the question arises whether the peculiar nature of the corporation and the relations of the borrowing members to it are such as to take the transaction out of the operation of the statutes of the state against usury. These transactions contain both the elements of a loan and of a dealing with partnership funds. If regarded merely as a loan they are usurious, while, if regarded as a dealing with partnership funds, they are innocent. In some parts of the United States are statutes authorizing the formation of such associations and the loaning of their moneys upon premiums paid by their members, and where such is the case the corporate mode of doing business is necessarily legalized and exempted from the penalties of usury. Partly from the influence of special statutes and partly because the courts have not regarded transactions of this class as mere loans of money, but as being part of a general business scheme in which the borrower participates in the profits and obtains advantages in addition to the mere loan of money to him, the majority of the decisions in this country sustain the transactions in question, and declare that they do not offend against the statutes upon the subject of usury: *Silver v. Barnes*, 6 Bing. N. O. 180; 8 Scott, 300; *Burbridge v. Cotton*, 5 De Gex & S. 17; 15 Jur. 1070; *In re Durham*, L. R. 12 Eq. 516; *Montgomery Mut. etc. Assn. v. Robinson*, 69 Ala. 413; *Reece v. Ladies' Bldg. Assn.*, 56 Ark. 335; *Taylor v. Van Buren etc. Assn.*, 56 Ark. 340; *West Winsted Sav. Assn. v. Ford*, 27 Conn. 282; 71 Am. Dec. 66; *Parker v. Fulton etc. Assn.*, 46 Ga. 166; *McLaughlin v. Citizens' etc. Assn.*, 62 Ind. 264; *Shaffrey v. Workingmen's Assn.*, 64 Ind. 60; *Hawkeye etc. Assn. v. Blackburn*, 48 Iowa, 385; *Burlington etc. Assn. v. Heider*, 55 Iowa, 424; *Massey v. Citizens' etc. Assn.*, 22 Kan. 624; *American Homestead Co. v. Linigan*, 46 La. Ann. 1118; *Robertson v. American etc. Assn.*, 10 Md. 397; 69 Am. Dec. 145, and note; *Shannon v. Howard etc. Assn.*, 36 Md. 383; *Merrill v. McIntire*, 13 Gray, 157; *Barker v. Bigelow*, 15 Gray, 130; *Sullivan v. Jackson etc. Assn.*, 70 Miss. 97; *Hammerslough v. Kansas City etc. Assn.*, 79 Mo. 80;

*Shannon v. Dunn*, 43 N. H. 194; *Bowen v. Lincoln etc. Assn.*, 51 N. J. Eq. 272; *Concordia etc. Assn. v. Read*, 93 N. Y. 474; *Patterson v. Workingmen's etc. Assn.*, 14 Lea, 677; *White v. Mechanics' etc. Assn.*, 22 Gratt. 233; *Winchester etc. Assn. v. Gilbert*, 23 Gratt. 787. Opposed to these are quite an array of decisions, some of which rest upon the ground that the particular transaction in question was especially burdensome and oppressive, exacting premiums far in excess of the benefits and advantages conferred upon the borrower, and others upon the broad proposition that no exemption can be made in favor of these associations, and that their transactions are necessarily usurious, when the amount received by them in consideration of the making of the loan is, with the interest paid, in excess of the highest rate of interest allowed by law: *Gordon v. Winchester etc. Assn.*, 12 Bush, 110; 23 Am. Rep. 713; *Waverly etc. Assn. v. Buck*, 64 Md. 338; *Goodman v. Durant etc. Assn.*, 71 Miss. 310; *Lincoln etc. Assn. v. Graham*, 7 Neb. 173; *Mills v. Salisbury etc. Assn.*, 75 N. C. 292; *Hoskins v. Mechanics' etc. Assn.*, 84 N. C. 838; *Bates v. People's etc. Assn.*, 42 Ohio St. 655; *Columbia etc. Assn. v. Bollinger*, 12 Rich. Eq. 124; 88 Am. Dec. 463; *Mechanics' etc. Assn. v. Dorsey*, 15 S. C. 462; *Martin v. Nashville etc. Assn.*, 2 Cold. 418; *International etc. Assn. v. Biering*, 86 Tex. 476; *Pfeister v. Whelling etc. Assn.*, 19 W. Va. 676. See note to *Robertson v. Homestead Assn.*, 69 Am. Dec. 160; *Falls v. United States etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194.

*Conflict of Laws.*—The note or other obligation in question may reserve a higher rate of interest than allowed by the laws of the state wherein it is attempted to be enforced, or, though it does not call for such higher rate, may call for a rate higher than that allowed by the laws of some other state, which are claimed to be applicable to it. The general principles governing this and other questions involved in the conflict of laws are: 1. That, if a note or obligation was valid where it was made, and did not there conflict with any usury law, it is equally valid in any other state in which an action is brought upon it, or whenever it is otherwise sought to be enforced, though its payment was secured by a mortgage or other security upon lands situate in a state other than of its execution: *Conner v. Donnell*, 55 Tex. 174; *De Wolf v. Johnson*, 10 Wheat. 367; *Andrews v. Pond*, 13 Pet. 65; *Miller v. Tiffany*, 1 Wall. 298; *Jewell v. Wright*, 30 N. Y. 259; 86 Am. Dec. 372; *Davis v. Garr*, 6 N. Y. 124; 55 Am. Dec. 387; 2. That if it offended the statute against usury in the state wherein it was executed and was payable it is subject to the penalties imposed by that statute, though the action upon it is in another state, by whose laws it would not have been usurious if executed therein: *Clague v. Creditors*, 2 La. 114; 20 Am. Dec. 300; *Jewell v. Wright*, 30 N. Y. 264; 86 Am. Dec. 362; and 3. That if the obligation was made in one state, but was to be performed in another, the parties were at liberty to regard it as a contract of either state, and to stipulate for any rate of interest allowable in either: *Peck v. Mayo*, 14 Vt. 33; 39 Am. Dec. 205; *McAlister v. Smith*, 17 Ill. 329; 65 Am. Dec. 651; *Chapman v. Robertson*, 6 Paige, 627; 31 Am. Dec. 264; *Kennedy v. Knight*, 21 Wis. 340; 94 Am. Dec. 543; *Depau v. Humphreys*, 8 Martin, N. S., 1; *Cromwell v. County of Sac*, 96 U. S. 62; *Dugan v. Lewis*, 79 Tex. 246; *Kilgore v. Dempsey*, 25 Ohio St. 413; 18 Am. Rep. 306. And as a result of this rule the parties to a contract may make it payable, or otherwise stipulate for the performance of it, in a state other than that of its execution, and, when they do so, may agree to pay the highest rate of interest permissible in either state: *Thornton v. Dean*, 19 S. 583; 45 Am. Rep. 796; *Wayne County Sav. Bank v. Low*, 81 N. Y. 566; 37 Am. Rep. 533; *Bigelow v. Burnham*, 83 Iowa, 120; 32 Am. St. Rep. 294;

*Junction etc. Co. v. Bank of Ashland*, 12 Wall. 226; *Cockle v. Flack*, 93 U. S. 344; *Cromwell v. County of Sac*, 96 U. S. 51; *Tilden v. Blair*, 21 Wall. 241; *Scott v. Perlee*, 39 Ohio St. 63; 43 Am. Rep. 421. To this last proposition there is a vigorous dissent in some of the states, the courts of which maintain that their laws against usury will be constantly evaded and rendered ineffective if the parties to a contract are at liberty to designate the place of payment or performance and to stipulate for the highest rate of interest allowable at that place: *Martin v. Johnson*, 84 Ga. 481; *Falls v. United States etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194. The proper answer to his argument is that mere shams and evasions are not permitted to counteract and annul the law, and where it appears that the purpose of the parties in making the obligation payable in another state was to evade the law against usury of the state in which it was executed, it will be regarded as infected with usury: *Pratt v. Adams*, 7 Paige, 615; *Railroad Co. v. Bank of Ashland*, 12 Wall. 226; *Andrews v. Pond*, 13 Pet. 65. "The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury": *Andrews v. Pond*, 13 Pet. 77, 78; *Curtis v. Leavitt*, 15 N. Y. 92; *Berrien v. Wright*, 26 Barb. 213. The converse of this proposition is also well settled. If the rate of interest be higher at the place of contract than at the place of performance the parties may lawfully contract in that case also for the higher rate: *Depeau v. Humphrey*, 8 Mart. N. S. 1; *Chapman v. Robertson*, 6 Paige, 634; 31 Am. Dec. 264. These rules are subject to the qualification that the parties act in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into. Whether void or valid there, it is so every where: *Andrews v. Pond*, 13 Pet. 78; *Mt. v. Madison Ins. Co.*, 11 Ind. 117; *Corcoran v. Powers*, 6 Ohio St. 19"; *Miller v. Tiffany*, 1 Wall. 310.

## RAILWAY COMPANY v. MURPHY.

[60 ARKANSAS, 323.]

**CARRIER, LIABILITY OF, WHEN COMMENCES.**—If a railway company furnishes an intending shipper, at his request, with a car, and leaves it upon a switch where it is loaded, and the agent of the carrier notified thereof, and he telegraphs to the trainmaster that the car is ready to be moved, the freight in such car must be deemed delivered to the carrier for the purpose of shipment, though no receipt has been given nor bill of lading issued therefor, if it is the custom of the carrier to move freight in advance of the issuing of such bill. In such circumstances the carrier is answerable for any subsequent loss of the goods not occasioned by the act of God or the public enemy.

**CARRIER, DELIVERY TO, WHAT IS SO AS TO FIX LIABILITY.**—When a shipper surrenders the entire custody of his goods to the carrier for immediate transportation, who accepts them, his liability at once commences. It matters not how long nor for what causes he may delay putting the goods in course of transportation.

**EVIDENCE.—THE BOOKS OF A DECEASED PARTY** to an action are admissible in evidence in an action in favor of his executor, if it is shown that they had been correctly kept and that the entries therein were in the handwriting of the deceased and were made contemporaneously with the facts recorded.

**EVIDENCE, WAIVER OF OBJECTIONS.—If**, on the offering of the entries of a book in evidence, there is no objection interposed on the ground that it is not shown that such entries were contemporaneous with the facts recorded, this objection must be regarded as waived and cannot be interposed on appeal.

*Dodge & Johnson*, for the appellant.

*H. King White, W. T. Woolridge, and Dan W. Jones & McCain*, for the appellee.

226 **WOOD, J.** This suit was to recover of appellant company for loss of cotton which, it is alleged in the complaint, had been delivered to appellant as a common carrier for immediate transportation. The answer of appellant denies that the cotton was delivered to or received by it, or that it agreed to transport the same. There was a verdict and a judgment for one thousand and sixteen dollars and fifteen cents.

The proof, so far as it may be necessary to state it in order to present the rulings of the lower court and of this court, is substantially as follows: John P. Murphy, plaintiff, lived and did business as a merchant and planter at Fairfield on appellant's railway. Fairfield had been a regular station, with an agent located there, from 1884 to the close of 1887, when the agent was withdrawn, and since which time there had been no agent there. It was a postoffice, and passenger trains stopped there regularly. Freight trains stopped occasionally, whenever freight was to be delivered to the company 227 for shipment, or when freight was to be received. The freight trains were stopped by flagging them down. Even when there was a regular agent at Fairfield freight trains did not stop unless they were flagged or had freight to unload. The company had its switch and platform on its own premises for the purpose of receiving and shipping freight. Freight shipped there had to be prepaid. For years John P. Murphy had been shipping cotton from Fairfield. The witness, in answer to the question, "What was the custom of the defendant company in the acceptance of freight for transportation?" said: "When we had cotton to ship we notified the company's agent at Noble Lake or Pine Bluff, and they would lay off a car at the switch. We would load

the car, and notify the same agent that we had finished loading it, and then they would move the car. The conductor would come along, and give us a receipt for the cotton, and we would carry the receipt to the agent at Pine Bluff, and he would give us a bill of lading." The witness further stated: "The conductor would take the car, and give us a receipt for it. He would check the cotton before he gave a receipt. They had a blank form, which I would fill out and the conductor would sign. I had such a receipt filled out from Tuesday, when the car was loaded, up to the time it was burned." In the present instance the car was ordered when the cotton was ready for shipment. The conductor laid it off at the switch on Saturday. It was loaded with the twenty-five bales of cotton by John P. Murphy on the Monday following, and on Tuesday the following letter was sent to the agent at Pine Bluff:

"FAIRFIELD, Nov. 25, 1891.

"Mr. Reinach, Agent, Pine Bluff,

DEAR SIR: Have car loaded with cotton on switch here for New Orleans. Please have moved as soon as possible.

"Yours truly,

"JOHN P. MURPHY,

"Per C. McN."

338 This letter was received by the agent at Pine Bluff on the morning of the day after it was written, and he immediately telegraphed the trainmaster at Little Rock that the car was ready to be moved. A book was identified as the cotton-book kept by John P. Murphy, the entries in his handwriting showing the weights, marks of the cotton, names of consignor and consignee and date of shipment, and the witness testified his belief as to its correctness. The book was admitted in evidence over the objection of the defendant. The cotton was set fire to and destroyed by a tramp on the night of the 27th of November, 1891.

The dominant question in the case, as presented by the pleadings, the proof, and the instructions, is, was there a delivery?

When the shipper surrenders the entire custody of his goods to the carrier for immediate transportation, and the carrier so accepts them, *eo instanti* the liability of the common carrier commences. When this occurs the delivery is complete, and it matters not how long, or for what cause, the carrier may delay putting the goods *in transitu*; if a loss in-



sustained, not occasioned by the act of God or the public enemy, the carrier is responsible. But, on the contrary, as there is no divided duty of safe-keeping, and no apportionment, in the event of a loss, between the owner and the carrier, the surrender of control over the goods by the shipper must be such as to give the carrier the unqualified right to put at once *in itinere*, and the carrier must have received them for that purpose. So that, when goods are delivered to the carrier that are not yet ready for shipment, awaiting further orders from the owner, or the happening of some contingency or compliance with some condition before they are ready to be moved, the liability of the carrier in the mean while can be no greater than that of an ordinary depository or bailee. These general principles are recognized <sup>229</sup> by all the authorities: Hutchinson on Carriers, secs. 82, 88, 89, 94; Angell on Carriers, secs. 129-131; 2 Rorer on Railroads, 1279; 2 Redfield on Railways, 67, et seq; *Little Rock etc. Ry. v. Hunter*, 42 Ark. 203; *O'Neill v. New York Cent. etc. R. R. Co.*, 60 N. Y. 138; *Rogers v. Wheeler*, 52 N. Y. 262; Story on Bailments, sec. 532; *Wells v. Wilmington R. R. Co.*, 6 Jones, 47; 72 Am. Dec. 556.

But the statement of the law is much easier than its application to the facts of each particular case. As Mr. Hutchinson says: "It frequently becomes a question of the greatest importance and of great nicety to determine at what instant of time the delivery becomes complete": Hutchinson on Carriers, sec. 94. The true legal test of the common carrier's liability, then, is a complete delivery. The time, place, and manner of such delivery, to make it complete, may depend upon the conventional arrangement between the parties. But, in the absence of any express stipulation, the carrier may as effectually bind himself by a uniform and usual course of business sufficiently long continued to have become an established usage: Hutchinson on Carriers, secs. 90, 93; 2 Rorer on Railroads, 1279; Chitty on Carriers, \* 27, note; *Montgomery etc. Ry. Co. v. Kolb*, 73 Ala. 396; 49 Am. Rep. 54; *Merriam v. Hartford etc. R. R. Co.*, 20 Conn. 354; 52 Am. Dec. 344; Story on Bailments, sec. 532.

Now, recurring to the facts of this case, it appears that the shipper, Murphy, had done all that was required of him, according to his particular course of dealing with the carrier, to further the shipment of his cotton. He had called for a car when his cotton was ready for transportation. The com-

pany had complied with his request by placing its car upon its own switch to be loaded. Murphy had loaded it, closed it, filled out the blank form of receipt to be signed by the conductor, and had notified the agent that the cotton was loaded and ready for shipment, giving the place of destination. He <sup>240</sup> had flagged every passing freight, and requested removal. He had done, it seems, all in his power, and all that the company required of him before shipment. What remained was exclusively the work of the carrier. It appears that the conductor was to come along, take the car, check the cotton, and issue the receipt. The car was to be moved before the consignor presented his receipt to the agent at Pine Bluff, and before the bill of lading was issued. The moving of the car, after it was loaded and closed, awaited solely the convenience of the carrier. So far as furnishing the name of the consignee and the place of destination is concerned the proof shows that this was not expected or required by the company before it placed the cotton *in transitu*, its custom being to move the car, and then issue its bill of lading. After starting the cotton upon its journey the carrier certainly could not be allowed to relieve himself of liability by showing that he had not been furnished with name of consignee, description of goods, or place of delivery.

We have examined the cases cited by counsel for appellant on the question of delivery, and they are clearly distinguishable in their facts from the facts presented by this record. These cases are in perfect accord with the legal principles we have announced concerning delivery.

In an Illinois case, cited by counsel for appellee, it was the course of business for a railroad company, when required to do so, to send its cars upon a sidetrack at the place of shipment, and the shipper there loaded the cotton upon the cars, made out a manifest, and left it with the agent of the company, who counted the bales, and, if found correct, issued a bill of lading. The company sent its locomotive, and removed the cars thus loaded, placing them in a train destined to the point of shipment. The manifest was presented to the agent, <sup>241</sup> but the number of bales had not been counted, and no receipt or bill of lading had been given. The cotton was partially consumed by fire, while standing upon the company's sidetrack. No difference is perceived between the facts of that case and the one at bar that should vary the legal principle controlling both. The fact that in the Illinois

case the cotton was destroyed at a regular station, with the agent always present, can make no difference, nor the fact that a manifest was made out and left with the agent; for in that case the supreme court said: "No difference is perceived in receiving freight on the platform of their depot and into their cars at any place on their road or sidetrack, or whether it is placed there by their own employees or by other persons, so it is done with the assent of the company." No significance can be attached to the fact that a manifest was filed with the agent in that case showing description of goods, name of consignee, and shipping directions. The cotton had not been counted or receipted for (same as in the case at bar) by agents of the company. But shipping directions had been given in the case at bar, so far as the place of destination was concerned, as appears from the letter to the agent at Pine Bluff. Moreover, it was distinctly shown that the name of consignee was not required before the carrier accepted the cotton for transportation. It was put *in transitu* before issuing its bill of lading. The company was held liable as a common carrier in the Illinois case (*Illinois Cent. R. R. Co. v. Smyser*, 38 Ill. 354, 87 Am. Dec. 301); and we consider that conclusion sound, and entirely applicable to the case under consideration. See, also, the following: *London etc. Fire Ins. Co. v. Rome etc. R. R. Co.*, 68 Hun, 598; *Evansville etc. R. Co. v. Keith*, 8 Ind. App. 57 (strong case, supporting the view announced); *Wilson v. Atlanta etc. Ry. Co.*, 82 Ga. 886; *Kansas City etc. Ry. Co. v. Lilly* (Miss., Jan. 19, 1891), cited in appellant's brief as tending to support the above doctrine.

243 The only remaining question necessary to consider is as to the admission of the cotton-book of John P. Murphy in evidence. The entries in the cotton-book showing the weights, marks, names of consignor and consignee, and date of shipment were clearly competent and relevant to the issue: 1 Greenleaf on Evidence, secs. 117, 119, notes; *Railway Co. v. Henderson*, 57 Ark. 402.

The court, however, before allowing the entries read, should have required a showing that the book was correctly kept, and that the entries were contemporaneous with the facts recorded: *Railway Co. v. Henderson*, 57 Ark. 402. The suit was progressing in the name of the executrix, and therefore it must be taken that proof of the death of Murphy had already been made. The appellee did show that the book was correctly kept, and that the entries were in the handwriting

of J. P. Murphy, but failed to show that the entries were contemporaneous. Appellant, however, made no specific objection to the introduction of the book on that account, and we think he must be held to have waived that point: *Rogers v. State*, 60 Ark. 76; *ante*, p. 154; *Vaughan v. State*, 58 Ark. 353. The laying of the foundation was preliminary, and, had the court's attention been directed specifically to this particular point, it doubtless would have required the proper showing, or excluded the evidence.

The court's charge to the jury on the question of delivery was in keeping with the views we have expressed, and, there being no prejudicial error in its ruling upon any other question raised, its judgment must be affirmed.

So ordered.

**CARRIERS—SUFFICIENCY OF DELIVERY TO—LIABILITY OF, WHEN COMMENCES.**—Though a shipper has agreed to load his property in the cars, and has not yet done so, the carrier is liable for its loss if it has been placed in his freight-house for the purpose of shipment, with the consent and under the direction of his freight agent, and it is ready for immediate transportation, and the cause of delay is the failure of the carrier to furnish the requisite cars: *London etc. Ins. Co. v. Rome etc. R. R. Co.*, 144 N. Y. 200; 43 Am. St. Rep. 752, and note, with the cases collected. See, also, the notes to *Merriam v. Hartford etc. R. R. Co.*, 52 Am. Dec. 349; *Illinois etc. R. R. Co. v. Smyser*, 87 Am. Dec. 304, and the extended note to *Campbell v. City of Stillwater*, 50 Am. Rep. 571.

**EVIDENCE—BOOKS OF ACCOUNT.**—An account-book of original entries, fair on its face, and shown to have been kept in the usual course of business, is admissible in evidence in favor of the person keeping it: *Anchor Milling Co v. Walsh*, 108 Mo. 277; 32 Am. St. Rep. 600, and note; *Robinson v. Smith*, 111 Mo. 205; 33 Am. St. Rep. 510. See, also, *House v. Beak*, 141 Ill. 290; 33 Am. St. Rep. 307, and the extended note to *Union Bank v. Knapp*, 15 Am. Dec. 191.

## RAILWAY COMPANY v. NEVILL.

[60 ARKANSAS, 375.]

**CARRIER, LIABILITY OF WHEN CEASES.**—The liability of a carrier as such does not terminate on the arrival of the goods at the point of destination and on placing them in the station-house of the carrier there situated, if the consignee has not had a reasonable opportunity to remove them after notice to do so or after a reasonable effort on the part of the carrier to give such notice.

**CARRIER, LIABILITY FOR GOODS DESTROYED BY MOBS.**—Where there has been a total failure to deliver goods occasioned by the depredations or violence of mobs or rioters the carrier is answerable.

*Dodge & Johnson*, for the appellant.

*W. P. & A. B. Grace*, for the appellee.

<sup>377</sup> **WOOD, J.** The appellant company received some corn and hay at Pine Bluff for transportation to Linwood station, there to be delivered, upon payment of freight, to C. E. Nevill, the appellee. About the hour the freight train was to arrive appellee appeared at the station to receive his freight. The train did not arrive on time. Appellee waited till after sunset, and returned to his home. Soon after his departure the train came in, and appellee's goods were safely deposited in appellant's warehouse at Linwood. Next morning appellee returned with his teams to receive his goods, but, during the night, a mob of negroes, which the civil authorities were unable to control, set fire to appellant's station-house, and destroyed same, together with the goods of appellee. Appellee sued for and obtained judgment against the company for the value of his goods, and the company appeals.

The questions for our consideration are presented by the following instructions: 1. "That the receipt of the goods by the company's agent at Linwood, and placing them in the station-house, did not, of itself, change the relations existing between the consignee and the company, and change the liability of the latter from that of carrier to warehouseman, because the court adopts what is commonly known as 'the New Hampshire rule,' and holds that, before the liability as carrier ceases and that of warehouseman begins, the consignee must have had a reasonable opportunity to <sup>378</sup> remove the goods after notice to do so, or after a reasonable effort by the company to give him notice." 2. "The court further declares, upon the facts stated, the mob of rioters referred to was not a public enemy, in the legal meaning of that term; and therefore its acts in destroying the property did not relieve the defendant of its liability, as a common carrier, to deliver the same to consignee."

1. Two well-defined, but widely divergent, rules have been announced by the American courts upon the proposition embodied in the first of the above instructions. In 1854 the supreme court of Massachusetts determined that the liability of railroads as common carriers ceased the moment the goods of the consignee were removed from their cars and placed in a safe place upon their platforms within their depots, and that, from that time until the goods were called for and

delivered to the consignee, the liability of the railroad was only that of warehouseman: *Norway etc. Co. v. Boston etc. R. R. Co.*, 1 Gray, 263; 61 Am. Dec. 423. This rule has been approved in several states: Illinois, Indiana, Iowa, Georgia, California, Missouri, North Carolina, Tennessee.

In 1856 the supreme court of New Hampshire expressly departed from the doctrine of the Massachusetts court, holding that the liability of the carrier as such continued until the owner should have a reasonable time after the arrival of the goods to accept and remove them: *Moses v. Boston etc. R. R. Co.*, 32 N. H. 523; 64 Am. Dec. 381. This doctrine has been approved by the supreme courts of the following states, to wit: Alabama, Louisiana, Kentucky, New Jersey, Kansas, Ohio, Vermont, Wisconsin, New York, Michigan, Minnesota, Texas, Connecticut, Pennsylvania.

Counsel for appellant cite Alabama and Pennsylvania as supporting the Massachusetts rule, but an examination of the cases of *Louisville etc. R. R. Co. v. McGuire*, 379 79 Ala. 395, and *Louisville etc. R. R. Co. v. Oden*, 80 Ala. 39, and the case of *National Line Steamship Co. v. Smart*, 107 Pa. St. 492, will discover that Alabama and Pennsylvania are in line with the New Hampshire rule as to the consignee having a reasonable time in which to remove the goods, during which time the liability of the carrier as an insurer continues. Counsel for appellees are likewise mistaken in putting Tennessee in the New Hampshire column: See *Butler v. East Tennessee etc. R. R. Co.*, 8 Lea, 32.

But, whatever rule we adopt, we will be but going upon a well-beaten path, and following in the footsteps of eminent jurists. It is difficult to determine where lies the weight of authority amid such respectable conflict. But, considering the "broad principles of public policy and convenience, upon which the common-law liability of the carrier is made to rest," the doctrine of the New Hampshire court commends itself to our favor. We think it embodies the better reason. Without entering upon a discussion of these principles (for we could not hope to add any thing new), we simply announce our approval of the New Hampshire rule, as applicable to the undisputed facts of this case. This doctrine is supported, we believe, by a majority of the text writers, as well as the adjudicated cases. In addition to authorities cited in brief of counsel, see 2 Beach on Railways, 916; 3 Wood's Railway Law, 1908; 2 Redfield on Railways, 81; Story on Bailments, sec. 543,

and Hutchinson on Carriers, sec. 373. The last author, in his excellent work on Carriers, after giving most cogent reasons for the soundness of the New Hampshire rule, concludes as follows: "The same reasons, therefore, upon which is based the severe accountability of the carrier for the safety of his charge, would seem to require that railway companies should be held to be custodians of the goods in the same character in which they received them until they had either tendered them <sup>see</sup> to the consignee, or had, after informing him of their arrival, given him a reasonable time within which to take them away. This is, as we have seen, the well-settled law as to carriers by water, and no substantial reason can be urged why the rule should be further relaxed in favor of railroad companies."

Our own court, in *Turner v. Huff*, 46 Ark. 225, 55 Am. Rep. 580, speaking of the question of notice in regard to carriers by water, said: "A carrier by water may deliver goods on the wharf, but as a general proposition the consignee is entitled to actual notice of their arrival, that he may have an opportunity to move or safely store them. The necessity of notice may, however, be waived by the previous course of dealing between the parties." The same rule is applicable to railroads. The supreme court of New York, in *Fenner v. Buffalo etc. R. R. Co.*, 44 N. Y. 505, 4 Am. Rep. 709, has covered the whole doctrine of notice and reasonable opportunity to remove the goods after arrival at place of destination, as follows: "If the consignee is present upon the arrival of the goods he must take them without unreasonable delay. If he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight-house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases."

As to what is reasonable time for removal, where the facts are undisputed, as in this case, is a question of law. Where there is a dispute about the facts the question must be determined by the jury or court sitting as such. It should be said, however, that the question of reasonable time and opportunity to remove the goods is not in the least affected by any untoward or adventitious <sup>see</sup> surroundings peculiar to any particular consignee: Hutchinson on Carriers, 377.

2. Upon the second proposition the authorities are pro-

tically one way. Where there is a total failure to deliver goods, occasioned by the "depredations or the violence of mobs, rioters, strikers, thieves, and the like," the carrier is liable. For, says Mr. Hutchinson, "by the word 'enemies' in this connection is to be understood the public enemy of the country of the carrier, and not of the owner of the goods": Hutchinson on Carriers, 204, and authorities there cited.

The charge of the trial court was in harmony with the views we have expressed, and its judgment is therefore affirmed.

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**CARRIERS—LIABILITY OF, WHEN CEASES.**—A carrier's liability as carrier was held to have terminated when it appeared that he gave the consignee prompt notice of the arrival of the goods, and thereafter discharged them at the wharf, where they remained three days: *Tarbell v. Royal Exchange Shipping Co.*, 110 N. Y. 170; 6 Am. St. Rep. 350, and note. The liability of a common carrier of freight ceases upon the unloading of the goods from the car at the place of destination and placing them in a safe and secure warehouse: *Gregg v. Illinois Cent. R. R. Co.*, 147 Ill. 550; 37 Am. St. Rep. 238, and note. See, also, the note to *Scheu v. Benedict*, 15 Am. St. Rep. 429, and especially the extended note to *Ostrander v. Brown*, 8 Am. Dec. 214.

**CARRIERS—LIABILITY FOR LOSS OR DAMAGE TO GOODS FROM STRIKES OR MOBS.**—A common carrier is not liable for loss or damage naturally resulting from delay in delivering freight caused by mobs or a strike of employees, accompanied by intimidation and violence which could not be prevented or suppressed by the carrier or the civil authorities: *Gulf etc. Ry. Co. v. Levi*, 76 Tex. 337; 18 Am. St. Rep. 45. This question is fully discussed in the extended note to *Norris v. Savannah etc. Ry. Co.*, 11 Am. St. Rep. 365.

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## RAILWAY COMPANY v. BERRY.

[60 ARKANSAS, 433.]

**CARRIERS, BAGGAGE, LIABILITY OF FOR.**—If a passenger, ignorant of the rules of a railway company forbidding the receipt by its agents of money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, informing the agent of the amount, who accepts it to ship as baggage, the carrier's common law liability therefor attaches.

**RAILWAYS.—A BAGGAGE-MASTER IS NOT ACTING BEYOND THE SCOPE OF** his employment when he receives more money for transportation as baggage than by the rules of his employer he is authorized to receive. An agent whose business it is to receive and check baggage is authorized by the nature of his employment and the duties incident thereto to bind his employer.

**ACTION** by the plaintiffs Berry for the value of a trunk delivered to an agent of the defendant railway company, to



be transported as baggage. The trunk, it was claimed, in addition to wearing apparel of the value of one hundred and thirteen dollars, contained four hundred and thirteen dollars in money. Verdict and judgment for the plaintiffs. Defendant appealed.

*Sam H. West and J. C. Hawthorne, for the appellant.*

*M. J. Manning and David A. Gates, for the appellee.*

<sup>435</sup> Wood, J. The appellant asked the following instructions: 1. "The jury are instructed that a railway company is not liable for the loss of money shipped as baggage, in excess of an amount necessary to be used while on a journey. 2. If the jury find from the evidence that the defendant is not engaged in transmitting money it would not be liable for the loss of money when shipped as baggage, even if its agents were informed that money was contained in the trunk shipped as baggage." The court refused these, and in effect charged the jury that, if a passenger, who had no notice of the company's instructions to its agents forbidding the taking of money for transportation as baggage, delivered to the agent of the railway company a trunk containing money, to be transported as baggage, and informed the agent who checked the trunk that it contained money, and the agent, after being so informed, received the same, then, in case of loss, the carrier would be liable. The requests granted and refused present the only question for our determination.

The carrier is liable as insurer for money which the passenger *bona fide* includes in his baggage to pay traveling expenses, and for personal use on his journey, provided no more is taken than is necessary or usual for passengers of like station, habits, and condition in life, while on similar journeys: Hutchinson on Carriers, secs. 682-688; Schouler on Bailments, secs. 669-671; Story on Bailments, sec. 449; 3 Wood's Railway Law, sec. 401; *Jordan v. Fall River R. R. Co.*, 5 Cush. 69; 51 Am. Dec. 44; Rorer on Railroads, 988; Angell on Carriers, sec. 115; 2 Beach on Railways, sec. 901; 2 Redfield on Railways, 59. For any amount in excess of this (which is a question for the jury) the carrier is not liable as such, unless he receives it with notice that the quantity is greater than is usually carried by passengers under the same or similar circumstances. And the passenger must observe the utmost candor and good faith in presenting <sup>436</sup> his baggage for transportation; for the carrier is only required to trans-

port according to appearances. If the passenger presents his baggage in a closed receptacle, such as is ordinarily carried as baggage, in order to lay upon the carrier the extraordinary responsibility of insurer the passenger must inform him if it contains any articles which the carrier is not bound to transport as baggage. This for the reason that the carrier, when thus notified, may refuse to carry altogether, or accept and charge a sum in addition to the passenger fare for the onerous liability he thus assumes: Schouler on Bailments, sec. 669, et seq.; Hutchinson on Carriers, sec. 685; Edwards on Bailments, sec. 529; 3 Wood's Railway Law, secs. 401, 406, 408; *Railroad Co. v. Fraloff*, 100 U. S. 24; 2 Beach on Railways, 902; *Davis v. Michigan etc. R. R. Co.*, 22 Ill. 278; 74 Am. Dec. 151; *Illinois Cent. R. R. Co. v. Copeland*, 24 Ill. 832; 76 Am. Dec. 749; 1 Rapalje and Mack's Digest of Railroad Law, "Baggage," 538, and authorities there cited.

The baggage-master is not out of the scope of his employment when he receives more money for transportation as baggage than by the rules of the company or instructions from his employer he is authorized to receive, for the carrier does carry some money as baggage, and the agent whose business it is to receive and check for baggage has the implied authority, by virtue of the nature of his employment, and the duties incident to it, to bind his employer, the carrier: Hutchinson on Carriers, sec. 688; 3 Wood on Railroads, sec. 408; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; 97 Am. Dec. 288; *Strouss v. Wabash etc. Ry. Co.*, 17 Fed. Rep. 209. As was said by a distinguished judge of New York: "The contract to carry the baggage of passengers, as incident to the contract to carry the person, does not become defined as to particular baggage, its amount or other incidents, until the baggage is delivered to the baggage-master": *Isaacson v. New York Cent. etc. R. R. Co.*, 94 N. Y. 278; 46 Am. Rep. 142.

437 We conclude that where a passenger, who is ignorant of the rules or instructions of railway companies forbidding their agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, if he accepts it to ship as baggage, and a loss occurs, the carrier's common-law liability will attach. We are aware that a different rule prevails in some of the states, notably Massachusetts: *Blumantle v. Fitchburg R. R. Co.*, 127 Mass. 322; 34 Am. Rep. 376; *Alling v. Boston etc. R. R. Co.*, 126 Mass. 121; 30 Am.

Rep. 667; *Jordan v. Fall River R. R. Co.*, 5 Cush. 69; 51 Am. Dec. 44; *Collins v. Boston etc. R. R. Co.*, 10 Cush. 506. See, also, *Bomar v. Maxwell*, 9 Humph. 620; 51 Am. Dec. 682. But the weight of authority is with the rule as we have announced it: *Camden etc. R. R. Co. v. Baldauf*, 16 Pa. St. 67; 55 Am. Dec. 481; *Hutchinson on Carriers*, sec. 685; *Jacobs v. Tutt*, 33 Fed. Rep. 412; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Humphreys v. Perry*, 143 U. S. 627; *Great Northern Ry. Co. v. Shepherd*, 8 Ex. 30; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; 97 Am. Dec. 288; and other cases cited in brief of counsel for appellee: See *Rapalje & Mack's Digest of Railroad Law*, 536-539, and cases cited.

While most of these cases have reference to merchandise in some form, yet the rationale of the doctrine as to it, when carried as baggage, is equally applicable to money, where it is carried as baggage. As to what would be the rule if the money was accepted and carried as freight is nowhere presented. The proof on the part of the plaintiff showed that the agent who checked the trunk was informed of the amount of money it contained before he checked it for transportation. The instructions, therefore, being in harmony with the law, and the verdict of the jury having evidence to support it, the judgment of the Monroe circuit court is affirmed.

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**CARRIERS—BAGGAGE—MONEY AS.**—Bank bills to a reasonable amount may be considered baggage, and, when carried in a trunk and lost, their value may be recovered: *Illinois Cent. R. R. Co. v. Copeland*, 24 Ill. 332; 76 Am. Dec. 749, and note. Baggage does not include an unreasonable amount of money: *Davis v. Michigan etc. R. R. Co.*, 22 Ill. 278; 74 Am. Dec. 151, and note; *Pfister v. Central Pac. R. R. Co.*, 70 Cal. 169; 59 Am. Rep. 404. The recovery by a passenger against a carrier for loss of money contained in his trunk is confined to such sum only as was necessary for personal use and traveling expenses: *Hickox v. Naugatuck R. R. Co.*, 31 Conn. 281; 83 Am. Dec. 143, and note. While the obligation of a carrier of passengers is limited to ordinary baggage, yet if it knowingly permits a passenger, either with or without payment of extra charge, to take articles as baggage which are not properly such, it will be liable for their loss, though without fault: *Oakes v. Northern Pac. R. R. Co.*, 20 Or. 392; 23 Am. St. Rep. 126. See, also, the notes to the following cases: *Connolly v. Warren*, 8 Am. Rep. 304; *Orange County Bank v. Brown*, 24 Am. Dec. 137, and the extended note to *Hutchings v. Western etc. R. R. Co.*, 71 Am. Dec. 161.

**CARRIERS—AUTHORITY OF BAGGAGE-MASTER.**—A carrier undertaking to carry baggage is liable for its loss, whether its agent had authority to accept it or not: Note to *Minter v. Pacific R. R.*, 97 Am. Dec. 291.

## BRINKLEY CAR COMPANY v. COOPER.

[60 ARKANSAS, 545.]

**LANDOWNER, TRESPASSING CHILDREN, LIABILITY FOR INJURY TO.**—If a landowner allows hot water to escape and stand in a pool on his premises into which a child walks or falls and is injured, the jury, in an action to recover for such injury, should be instructed to consider whether the pool of water was attractive to children of the age of plaintiff, and whether this was or ought to have been known to the defendant, and whether, from all the circumstances, it appeared that the defendant, as a responsible prudent person, ought to have anticipated that children of the age of plaintiff would probably receive such injury as he did by reason of the situation and condition of the water.

**CHILDREN ARE REQUIRED TO EXERCISE ONLY SUCH CARE AND PRUDENCE** as may be reasonably expected of those who possess only the intelligence and maturity of judgment which they possess.

**LANDOWNER—TRESPASSING CHILDREN.**—The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon, but he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon such grounds, and that, from the peculiar nature and exposed condition of some thing thereon, it is attractive to children, and he ought reasonably to anticipate such an injury to a child as that which in fact occurred.

**ACTION** to recover compensation for injuries inflicted upon the plaintiff, a child about six years of age, from being scalded by hot water standing in a pool on the premises of the defendant corporation. This water had been let out of a boiler by a watchman of the defendant, and, running through a plank conduit, had flown into a pit about sixty feet distant from the defendant's mill. The plaintiff, with a child of the watchman, had gone with the latter to the mill against his protest. The pool into which the water ran was on the private grounds of the defendant, some three hundred feet distant from the nearest street or traveled way in the town in which the mill was situated. Children had sometimes been in the habit of playing in a pile of sawdust about one hundred and fifty feet from the water. This water might have been covered without inconvenience. Before the day on which the accident happened children had not been accustomed to play about the pool, nor was there any allegation or evidence that the pool was known to children before that day or that it or its surroundings were attractive to them. The complaint charged "that defendant negligently and carelessly failed and neglected to cover and inclose said pit, or post any notices or sign indicating that it contained boiling

water, but negligently and carelessly and wantonly deposited in said pit pieces of bark from logs or timber brought to its yards, which said pieces of bark congregated and floated so thickly upon the top of the boiling water in said pit, that persons passing near it could not see the water in said pit," and that plaintiff, not being able to see such water, walked therein and was scalded. When the watchman let the water out of the boiler he cautioned the plaintiff not to go about the water because it was hot. Judgment for plaintiff, defendant appealed.

*C. F. Greenlee and N. W. Norton*, for the appellant.

*T. C. Trimble and M. J. Manning*, for the appellee.

<sup>548</sup> HUGHES, J. The instructions given by the circuit court to the jury in this case are based upon the theory that the defendant was obliged to fence or inclose its private grounds to prevent injury to all persons who might trespass thereon. This is error, and the instructions are inapplicable and erroneous.

The instructions asked by the appellant are based upon the converse of this theory; that is, that, as matter of law, the company owed no duty to any trespasser upon its private grounds, and was therefore not liable for injuring an infant, while so trespassing, unless the injury was wantonly inflicted. This is also erroneous.

The jury should have been instructed in this case that, in determining whether the defendant was liable or not for the injury received by the child, they should consider whether it appeared from the evidence that the pool of water in which he was scalded was attractive to children of the age of appellee, and whether this was or ought to have been known to the appellant, and whether, <sup>549</sup> from all the circumstances in evidence, it appeared that the appellant, as a reasonably prudent person, ought to have anticipated that children of the age of the plaintiff would probably receive such injury as the plaintiff did receive, by reason of the situation and condition of the pool of water at the time the plaintiff received his injury. Children are required to exercise only such care and prudence as may reasonably be expected of those who possess only the intelligence and maturity of judgment which they possess: *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. Milwaukee etc. R. R. Co.*, 21 Minn. 207; 18 Am. Rep. 393; *Birge v. Gardiner*, 19 Conn. 507; 50 Am. Dec. 261; *Evansich*

*v. Gulf etc. R. R. Co.*, 57 Tex. 126; 44 Am. Rep. 486; *Lynch v. Nurdin*, 1 Ad. & E., N. S., 29. The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon it, and that, from the peculiar nature, and exposed and open condition, of some thing thereon, which is attractive to children, he ought reasonably to anticipate such an injury to a child as that which actually occurs: *Bransom v. Labrot*, 81 Ky. 638; 50 Am. Rep. 193.

"It would put the proprietors of real estate under an oppressive burden to make them insurers against remote and improbable injuries to children while trespassing thereon": *Thompson on Negligence*, secs. 603, 604, and cases there cited.

For the errors indicated the judgment is reversed and the cause is remanded for a new trial.

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**LANDOWNER'S LIABILITY TO INFANT TRESPASSERS.**—Though a child of tender years meeting with injury on the premises of a private owner is a technical trespasser, yet the owner is liable if the things causing injury have been left unguarded and are of such a character as to appeal to childish curiosity: *City of Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114, and note, with the cases collected.

**NEGLECT—INFANTS—CARE REQUIRED OF.**—A child is held to such care and prudence only as are usual among children of his age and capacity: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note.

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## HENDREN v. WING.

[60 ARKANSAS, 561.]

**A CHATTEL MORTGAGE TAKEN IN THE NAME OF A PARTNERSHIP WITHOUT MENTIONING THE NAME OF EITHER OF ITS PARTNERS is not on that account invalid.**

*John J. & E. C. Hornor*, for the appellants.

561 **RIDDICK, J.** The appellees D. R. Wing, C. E. Stephens, and Joseph Eggleston are partners doing business under the firm name of Arkansas Machinery & Supply Company. In the course of their business as such firm they sold one E. H. Miller the following machinery: One thirty-five horse-power return tubular boiler, with fixtures and fittings, and one thirty-

five horse-power C. & T. engine complete with fixtures and connections. For this property Miller agreed to pay nine hundred and six dollars and fifty cents, and he gave his note for that amount, payable in installments. Afterward, to further secure the payment of these notes, Miller executed a mortgage to said Arkansas Machinery & Supply Company, including in said mortgage the machinery purchased and also other property. Miller at this time was also indebted to appellants, and to secure the same had previously given them a mortgage on another boiler and engine. He disposed of this machinery <sup>563</sup> without appellants' consent, and replaced it with the machinery in controversy. Appellants obtained possession of the boiler and engine purchased from appellees, and claim the right to hold same in lieu of the boiler and engine wrongfully disposed of by Miller. Appellees brought replevin to recover the same. Their action was resisted on the ground that the mortgage to the Arkansas Machinery & Supply Company, under which appellees claimed, did not contain the name of either a natural or artificial person, and was therefore void. The circuit court held that the mortgage was valid, and gave judgment in favor of appellees.

The Arkansas Machinery & Supply Company is not a corporation, but it is the business name of a firm of partners. The question for us to determine is whether a chattel mortgage, executed to it as such partnership, is valid at law. The decisions in regard to transfers of real estate to partnerships are based on the old rule that "a partnership, as such, cannot at law be the grantee in a deed, or hold real estate": *Percifull v. Pratt*, 36 Ark. 464. This rule does not apply to personal property. On the contrary, a partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property. The custom of the country teaches us that this is so. The business of the country is largely carried on by partners under partnership names, which frequently do <sup>563</sup> not contain the name of any person. Vast quantities of personal property of all kinds are contracted for, bought, and sold by such firms under their firm names each year, and their right to thus buy and sell goes unchallenged. A consideration of this fact shows that there is a wide distinction between the rights of partnerships at law in regard to the buying and selling of personal property and the restrictions which prevail there in regard to transfers of real estate.

A mortgage is only a conveyance for the purpose of secur-

ing a debt. If a bill of sale conveying personal property to a partnership by its firm name is valid we see no reason why a mortgage of personal property to a partnership should not be upheld under like circumstances. It is true that the statute requires certain formalities in regard to acknowledging and recording mortgages in order to give notice to third parties. But there is nothing in the statute which renders invalid mortgages of personal property executed to a partnership by its firm name. Such a conveyance to a firm is just as effectual as if the name of each partner had been set out in the mortgage: *Henderson v. Gates*, 52 Ark. 371; *Kellogg v. Olson*, 34 Minn. 103; *Byam v. Bickford*, 140 Mass. 32; *Brunson v. Morgan*, 76 Ala. 593; *Chicago Lumber Co. v. Ashworth*, 26 Kan. 212.

We therefore conclude that the judgment of the circuit court in regard to the validity of the mortgage was correct, and it is affirmed.

The record presents other questions, but we find nothing in them to warrant a reversal. They were not discussed by counsel, and we have deemed it unnecessary to discuss them here.

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CHattel Mortgages—Execution of.—The absence of the names of the individual members of a partnership from a chattel mortgage executed to it will not invalidate the mortgage: *Chicago Lumber Co. v. Ashworth*, 26 Kan. 212.



# CASES

IN THE

# SUPREME COURT

OF

# CALIFORNIA.

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## INGRAM v. COLGAN.

[106 CALIFORNIA, 112.]

**CONSTITUTIONAL LAW—APPROPRIATIONS.**—TO AN APPROPRIATION WITHIN THE MEANING OF THE CONSTITUTION NOTHING MORE IS REQUISITE than a designation of the amount and the fund out of which it shall be paid. It is not essential that the fund set apart to meet the same be at the time in the treasury, and, in some instances, an act making an appropriation need not name the fund out of which payment is to be made.

**CONSTITUTIONAL LAW.**—TO AN APPROPRIATION IT IS NECESSARY that the amount of money appropriated shall be designated, and if, from the statute, it is not possible to ascertain the amount to be paid out, no valid appropriation is made.

**CONSTITUTIONAL LAW—APPROPRIATION UNCERTAIN IN AMOUNT.**—A statute declaring that any person who shall kill or destroy any coyote shall be paid a bounty of five dollars out of the general fund of the state treasury for each coyote so destroyed does not constitute a specific appropriation, nor authorize the payment of any money until a further appropriation is made.

**CONSTITUTIONAL LAW—BOUNTIES FOR KILLING COYOTES.**—A statute authorizing the payment of a sum of money for each coyote destroyed within the state is a valid exercise of its police power.

**CONSTITUTIONAL LAW—GIFTS OF PUBLIC MONIES, WHAT ARE NOT.**—A statute authorizing a bounty to be paid for the destruction of coyotes does not amount to a gift, and therefore does not conflict with the constitutional provision declaring that the legislature shall have no power to make any gift, or to authorize the making of a gift, of any public money or thing of value to any individual, or municipal or other corporation, whatever.

▲ **GIFT** is a voluntary transfer of his property by one to another without any consideration or compensation therefor.

▲ **BOUNTY SIGNIFIES** moneys paid, or a premium offered, to encourage or promote an object, or procure a particular act or thing to be done, or a sum or other thing, given generally by the government, to certain persons for some service they have done or are about to do the public.

**THE DIFFERENCE BETWEEN A BOUNTY AND A REWARD** is that the former applies to services where the act of many persons is desired, each of whom may act upon the offer and entitle himself to its benefits, without prejudicing the claims of another, while the latter applies to the case of a single service which can be performed but once, and the performance of which terminates the power of any other person to entitle himself to it by any subsequent act.

**THE RIGHT TO A BOUNTY BECOMES VESTED** when it has been earned by a full compliance with the conditions of the statute.

**A CLAIM** is a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty.

**CLAIMS AGAINST STATE, WHEN MUST BE PRESENTED TO THE BOARD OF EXAMINERS.** — If a statute provides that any person having a claim against the state may present it to the board of examiners, and that the controller of the state must not draw his warrant for any claim unless it has been approved by that board, another and subsequent statute providing that every person who shall kill a coyote shall be paid a bounty of five dollars out of the general fund, and that he shall make proof to the board of supervisors of the county in which the animal was killed, and deposit its scalp with them, and that there shall thereupon be issued to him a certificate of the clerk of such board showing the number of scalps so deposited, and that, on such certificate being presented to the controller, he may draw his warrant on the general fund for the sum named therein in favor of the person entitled thereto, that officer is not authorized to act until the claim has been presented to and approved by such board of examiners.

*Attorney General W. H. Hart and Deputy Attorney General William H. Layson, for the appellant.*

*Freeman & Bates, for the respondent.*

<sup>115</sup> **HENSHAW, J.** Upon joint petition of appellant and respondent this cause was ordered to be heard in Bank for the determination of the single question whether or <sup>116</sup> not the act under consideration ("An act fixing a bounty on coyote scalps," Stats. of 1891, p. 280) made appropriation for the payment of claims arising under it.

The opinion heretofore rendered (filed October 30, 1894) stands confirmed, and what is now added is to be construed with it.

The objections raised to the sufficiency of the act are: 1. That no appropriation at all is made by it; 2. That if an appropriation is made, that appropriation is void for uncertainty in amount.

It is provided by article 4, section 22, of the constitution that "no money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the controller." This inhibition

is supplemented by subdivision 17 of section 433 of the Political Code: "No warrant must be drawn unless authorized by law, and upon an unexhausted, specific appropriation provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the services for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof."

The constitution of 1849 (art. 4, sec. 23) provided: "No money shall be drawn from the treasury but in consequence of appropriations made by law." By act of the legislature in 1854 the duties of the controller were expressed in terms substantially the same as those now found in subdivision 17 of section 433 of the Political Code above quoted: *Stats. 1854, p. 29.*

The laws of the state regarding appropriations have thus been uniform from a very early day, and, if any contrariety of opinion be found in the adjudicated cases, it cannot be explained upon the ground of changed provisions in the law.

One of the earliest cases upon the question of appropriation is that of *McCauley v. Brooks*, 16 Cal. 28. The act there in question provided that the sum of fifteen thousand dollars per month, or a sum less than that in accordance with the contract to be entered into, "is <sup>117</sup> hereby appropriated out of any money in the treasury not otherwise appropriated." It was claimed that no specific appropriation of funds in the treasury had been made. The opinion by Field, C. J., is an elaborate exposition of the law, and in it he says: "To an appropriation within the meaning of the constitution nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the yearly revenues. It constitutes, indeed, the authority of the controller to draw his warrants, and of the treasurer, when in funds, to pay the same, and that is all. When the constitution, therefore, says that no money shall be drawn from the treasury but in consequence of appropriations made by law, it only means that no money shall be drawn except in pursuance of law; and when the act of April 13, 1854, pro-

vides that no warrants shall be drawn except there be an 'unexhausted, specific appropriation' to meet the same, it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object."

The true test as to whether any particular language in an act is sufficient to make an appropriation is here found. "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." If the amount be certain, one of the reasons for the constitutional requirements is complied with, in that the people are enabled to determine how much of their money is to be devoted to the named purpose. The designation of the fund likewise enables the people to see how much of the moneys set apart to a particular fund is to be drawn from it and used for the <sup>118</sup> specific end. But under our system, countenanced by the custom of years, it is not necessary in all cases that the act in terms should name the fund. The general fund itself is defined to be "the moneys received into the treasury, and not specifically appropriated to any other fund": Pol. Code, sec. 454. From these moneys all appropriations are paid which are not made payable out of any other especially named fund.

The language of the act here under consideration is as follows: "Any person who shall kill or destroy any coyote or coyotes shall be paid a bounty of five dollars out of the general fund in the state treasury, for each coyote so destroyed." The question remains whether, measured by the rule above given, this language constitutes an appropriation. We think not. The fund from which the bounties are to be paid is explicitly designated, but the amount of money in the general fund devoted to the payment of these bounties is not specified. The language lacks the first essential to an efficient appropriation. There is no designated amount, and, consequently, there is no "specific appropriation" to be exhausted, unless it can be said that the whole general fund is set aside as a specific appropriation to the end in view, a proposition not seriously to be considered: *Redding v. Bell*, 4 Cal. 333.

It is freely conceded that the use of technical words in a statute is not necessary to create an appropriation. But, while no set form of language is requisite, upon the other

hand there are some things which, plainly enough, are not severally an appropriation. A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment: *Ristins v. State*, 20 Ind. 333. The utmost that can be claimed for the act under consideration is that it pledges the good faith of the state to the making of an appropriation.

119 Herein the language of the supreme court of Colorado, in *Institute etc. v. Henderson*, 18 Col. 105, is peculiarly apposite: "To permit the disbursement of an indefinite amount of money, as these bounty acts contemplate, is to introduce an element of uncertainty into these calculations that will seriously embarrass both the legislature and the departments in giving effect to our state constitution with relation to the levying of taxes to meet appropriations. If the legislature desires to pay bounties, it may do so for all proper purposes by making the necessary appropriations therefor. Thus, the public funds of the state will be protected, and the safeguards provided by the vigilance of the framers of our fundamental law will be given a construction best calculated to prevent the evils aimed at."

The conclusion thus reached is in nowise affected by such cases as *San Francisco v. Dunn*, 69 Cal. 73, and *Grand Lodge v. Markham*, 102 Cal. 169. In those cases the acts construed made contribution to the support of indigents, under article 4, section 22, of the constitution. As to the act under consideration in *Grand Lodge v. Markham*, 102 Cal. 169, the constitution itself provides the manner of the making of the appropriation, and the act conforming to the manner prescribed has the constitution of the state for its direct authority. In *San Francisco v. Dunn*, 69 Cal. 73, it was held that no legislative action is required to give force to the constitutional proviso, and that upon the happening of the contingency the language of the constitution, *ex proprio vigore*, acted as an appropriation, and qualified the general constitutional inhibition. These cases, therefore, are not in point upon the present question.

For this reason, in addition to those heretofore given, the judgment is reversed, and the court below directed to dismiss the writ.

TEMPLE, J., GAROUTTE, J., HARRISON, J., and MCFARLAND, J., concurred.

<sup>120</sup> BEATTY, C. J., and VAN FLEET, J., did not participate in this decision.

The following is the opinion above referred to, rendered in Bank on the 30th of October, 1894:

SEARLS, C. The act of the legislature of the state of California, approved March 31, 1891, entitled "An act fixing a bounty on coyote scalps" (Stats. 1891, p. 280), provides in its first section that "Any person who shall kill and destroy any coyote or coyotes, in any county of this state, after the passage of this act, shall be paid a bounty of five dollars out of the general fund in the state treasury for each coyote so destroyed."

The second section of the act provides that the person killing any coyote, as provided in section 1, shall present the scalp containing the nose and ears of the coyote destroyed to any officer authorized to administer oaths, and make and subscribe to an affidavit showing time and place that such animal was killed, which scalp and affidavit may be deposited with the clerk of the board of supervisors of the county in which such coyote was killed.

Section 3 provides that the board of supervisors shall quarterly determine the number of scalps deposited with the clerk, and by whom, and shall give to each person who may have deposited scalps a certificate certified by the clerk showing the number of scalps deposited by such person, and the sum due him at the rate of five dollars per scalp, and then proceeds as follows: "Such certificate may be presented to the controller of the state, who may draw his warrant on the general fund in the state treasury for the sum named therein, in favor of the person entitled thereto."

The remaining sections provide for the destruction of the scalps, and that no bounty shall be paid for scalps unless presented within three months after the coyote is killed.

The respondent, J.W. Ingram, in 1893, killed seventy-three <sup>121</sup> coyotes in the county of Kern, state of California; in due time presented the scalps, and made affidavit as by law provided, and in due and proper form received, after an examination, etc., a certificate of the clerk under seal of the board, showing that he had killed seventy-three coyotes, and that

there was due said Ingram the sum of three hundred and sixty-five dollars from the state of California.

The certificate was presented to appellant, as controller of state, April 26, 1894, and a demand made that he, the said controller, draw his warrant on the general fund in the state treasury in favor of said J. W. Ingram for said sum of three hundred and sixty-five dollars, which was refused.

Respondent thereupon filed an affidavit in the superior court in and for the county of Sacramento, setting out the foregoing facts, and showing a compliance with the terms of the statute, and averring that "after allowing and paying all warrants drawn by the state controller against the general fund, and all claims allowed by the state board of examiners for the forty-fifth fiscal year, there remains more than sufficient in said fund to meet the said warrant demanded by the said Ingram."

The sworn affidavit or petition admitted "that said claim of said Ingram has never been presented to nor acted upon by the state board of examiners."

An alternative writ of mandate issued to appellant as per the prayer of the sworn petition therefor.

Appellant appeared and demurred to the affidavit and petition upon various grounds, among which were: 1. That it did not state facts sufficient to constitute a cause of action; 2. That it fails to show that the claim was presented to the board of examiners before being presented to the state controller; 3. It does not show that said claim is exempt from the provision of section 672 of the Political Code; 4. It fails to show that there is an appropriation or available fund for the payment of the claim; 5. That said act is unconstitutional and void, in that it seeks to create an obligation on the part <sup>129</sup> of the state which would be a gift, and without sufficient consideration.

The demurrer was overruled, and, appellant refusing to answer, such proceedings were thereupon had that a peremptory writ issued to appellant, commanding him to draw his warrant upon the treasury, etc. Defendant appeals.

The statute in question comes within the purview of the police powers of the state. This power is said to extend to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. It is a power inherent in the state by virtue of, and one of the attributes of, its sovereignty.

Under the exercise of this general police power, persons and property are subject to restraints and burdens in order to secure the general comfort, health, and prosperity of the state, of the perfect right in the legislature to do which, as was said by Redfield, C. J., in *Thorpe v. Rutland etc. R. R. Co.*, 27 Vt. 140, 62 Am. Dec. 625: "No question ever was or upon acknowledged general principles ever can be made, so far as natural persons are concerned."

It is coextensive with self-protection, and is often referred to as "the law of overruling necessity."

It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society: *Lakeview v. Rose Hill Cemetery Assn.*, 70 Ill. 192; 22 Am. Rep. 71.

How far the provisions of the legislature can extend is always submitted (subject to constitutional limitations) to its discretion, provided its acts do not go beyond the great principle of securing the public safety; and its duty to provide for the public safety, within well-defined limits and with discretion, is imperative.

"All laws for the protection of lives, limbs, health, and quiet of the person, and for the security of all property within the state, fall within this general power of government": *State v. Noyes*, 47 Me. 189.

123 "Any law which goes beyond that principle, which undertakes to abolish rights, the exercise of which does not involve an infringement of the rights of others, or to limit the exercise of rights beyond what is necessary to provide for the public welfare and the general security, cannot be included in the police power of the government. It is a government usurpation, and violates the principles of abstract justice, as they have been developed under our republican institutions": *Tiedeman's Limitations on Police Powers*, 4, 5.

The statute of March 31, 1891, is not within the limitation to the exercise of the police power.

That coyotes are a pest and scourge to the breeders of sheep and other small domestic animals is matter of common knowledge. To provide adequate means of defense against this common enemy to those engaged in an important industrial pursuit is clearly within the general police powers of the legislative branch of the government, through which all police power is exercised.



The statute is not, then, void in the sense that it violates the fundamental principles of free government, and infringes upon the original rights of the citizen.

This remark is indulged for the reason that it has been said by some of the most eminent jurists of our country that the state legislature, in the absence of constitutional limitations, is not so far omnipotent that it can pass valid laws violative of the fundamental theories upon which enlightened government is constructed: *Calder v. Bull*, 3 Dall. 386; *Wilkinson v. Leland*, 2 Pet. 657; *Taylor v. Porter*, 4 Hill, 140; 40 Am. Dec. 274; *Goshen v. Stonington*, 4 Conn. 209; 10 Am. Dec. 121; *Varick v. Smith*, 5 Paige, 137; 28 Am. Dec. 417; *Griffith v. Commissioners*, 20 Ohio, 609; *Ross' case*, 2 Pick. 169.

There is no suggestion that the statute infringes the federal constitution.

It remains, then, to inquire, Does it violate any provision of the constitution of this state?

The contention of appellant is that the bounty provided <sup>124</sup> to be paid by the statute is a gift, and inhibited by the thirty-first section of article 4 of the constitution of California, which, so far as applicable, is as follows:

"The legislature shall have no power to give or to lend, etc. . . . Nor shall it have power to make any gift, or authorize the making any gift, of any public money or thing of value to any individual, municipal or other corporation whatever."

A gift has been judicially defined as "a voluntary transfer of his property by one to another, without any consideration or compensation therefor": *Gray v. Barton*, 55 N. Y. 72; 14 Am. Rep. 181. To the same effect is 2 Blackstone's Commentaries, 440; 2 Stephen's Commentaries, 102; 2 Kent's Commentaries, 437.

A bounty signifies moneys paid or a premium offered to encourage or promote an object or procure a particular act or thing to be done: *Fowler v. Danvers*, 8 Allen, 84.

A sum of money or other things given, generally by the government, to certain persons for some service they have done or are about to do the public: *Abbe v. Allen*, 39 How. Pr. 484.

The terms "bounty" and "reward" are nearly allied in meaning, the distinction being, the former is said to be the appropriate term where the services or action of many per-

sons are desired, and each who acts upon the offer may entitle himself to the promised gratuity without prejudice from or to the claims of others; while a reward applies to the case of a single service, which can be only once performed, and, therefore, will be earned only by the person or co-operating persons who succeed while others fail: *Black's Law Dictionary*, title, Bounty.

A primary meaning of bounty is, goodness, kindness, virtue, worth; 2. Liberality in bestowing gifts or favors, gracious or liberal giving, generosity, munificence; 3. A premium offered or given to induce men to enlist in the public service, or to encourage any branch of industry, <sup>135</sup> as husbandry or manufactures: *Webster's Dictionary*.

As applied to bounties given by statute, there is a consideration implied; so long as the consideration is not rendered it remains a mere offer or privilege, which may be taken away by a repeal of the statute; but, when earned by complying with the conditions of the statute, the right to the bounty becomes vested: *Cooley's Constitutional Limitations*, 6th ed., 471, 472; *East Saginaw Salt Mfg. Co. v. East Saginaw*, 19 Mich. 259; 2 Am. Rep. 82; 13 Wall. 373; *People v. Board of Auditors*, 9 Mich. 327.

There being a consideration for the claim of respondent rendered by him under the offer of the statute, the money claimed is not a gift, and is not, therefore, obnoxious to the provision of the constitution quoted *supra*: *Ryer v. Stockwell*, 14 Cal. 134; 73 Am. Dec. 634.

Our attention is not called to any other constitutional provision, either state or federal, with which the statute in question is claimed to conflict; hence we conclude that, as the statute comes within the general welfare for which the legislature is authorized to provide under its police powers, and not being violative of the fundamental law, must be upheld as a valid and subsisting law.

Q. Should the claim have been presented to the state board of examiners?

The trial court evidently proceeded upon the theory that, as the act of March 31, 1891, provided that any person who shall kill and destroy any coyote or coyotes in any county of the state shall be paid a bounty of five dollars for each coyote so killed out of the general fund of the state treasury; and provided for taking the proof thereof and issuing a certificate therefor by the board of supervisors of the proper county; and

provided that "such certificate may be presented to the controller of the state, who may draw his warrant on the general fund in the state treasury," etc., dispensed with the necessity of a presentation of the claim to the state board of examiners.

<sup>126</sup> Section 660 of the Political Code provides that any person having a claim against the state, for which an appropriation has been made, may present the same to the board (of examiners); if the board approves the same they must, under section 661, indorse their approval thereon, and transmit the same to the controller, who must thereupon draw his warrant, etc.

If no appropriation has been made for the payment of a claim provided for by law, or if an appropriation made has been exhausted, the board must, upon approving it, transmit it to the legislature with a statement of their approval.

Section 672 is as follows: "SEC. 672. The controller must not draw his warrant for any claim unless it has been approved by the board, and, when hereafter the controller is directed to draw his warrant for any purpose, this direction must be construed as subject to the provisions of this section, unless the direction is accompanied by a special provision exempting it from its operation."

Section 673 exempts official salaries and claims upon the contingent fund of either house of the legislature from the operation of the foregoing sections.

It will be perceived that by section 672 a direction to the controller to draw his warrant in payment of a claim which has not been approved by the board of examiners is not sufficient unless it is accompanied by a special provision exempting it from the operation of that chapter.

We find nothing in the provision of the statute in question exempting the claims therein provided for from the section.

Respondent contends that there was no necessity for presenting the claim to the board of examiners; that it had been audited and made certain by the action of the board of supervisors, so that no duty remained except to make payment, and, in support of this view, we are referred to *Meyer v. Porter*, 65 Cal. 67; *Freehill v. Chamberlain*, 65 Cal. 608; *County of Green v. Daniels*, 102 U. S. 187; *Lincoln County v. Luning*, 133 U. S. 532.

<sup>127</sup> *Meyer v. Porter*, 65 Cal. 67, was a case in which a mandate was sought against the treasurer of Sacramento to compel him to pay out of funds in the city treasury certain past

due and payable coupons belonging to bonds issued by the city under a statute passed in 1858, and which provided an interest and sinking fund for the payment of the interest annually and the bonds at maturity.

It was claimed on behalf of the city, among other things, that the coupons should have been presented for examination, audit, and allowance to the board of trustees and auditor pursuant to a statute in 1863.

This court held, however, that as the law under which the bonds issued made it the duty of the treasurer to pay the coupons, in the manner and out of the fund provided for that purpose, no warrant was necessary to authorize their payment.

In *Freehill v. Chamberlain*, 65 Cal. 603, the same question was raised, and the court held that the statute under which the bonds were issued established them as debts to be paid, and hence that neither the auditor nor the board of trustees had any discretion or authority to reject them or prevent payment.

It will be observed that these cases involved contracts entered into by the city under and pursuant to a statute authorizing them so to do, and providing the time, place, and manner of payment, and that the act of 1863 (Stats. 1863, p. 415) was a law passed long subsequently, and imposing new burdens upon the holders of city bonds.

In *County of Green v. Daniels*, 102 U. S. 187, where a like question was raised, it was held that the issuing of the bonds by the county court, signed by its presiding officer, was the equivalent of auditing by the same body, as required by a statute in case of claims against the county, and that the amount and validity of the liability were definitely fixed when the warrants issued.

In *Lincoln County v. Luning*, 133 U. S. 532, it was held that a similar clause requiring claims to be presented to the <sup>128</sup> county commissioners, etc., applied only to unliquidated claims and accounts, and did not apply to bonds and coupons.

*Sawyer v. Colgan*, 102 Cal. 283, related to the duty of the controller to issue his warrant in payment of coupons upon bonds issued under an act passed in 1857, known as Indian war bonds, and it was held that, in view of the provisions for their payment under the law, it was not necessary to present such coupons to the examiners.

The board of examiners was not provided for until 1858 (Stats. 1858, p. 212). Since that date it has been in force, and section 762 of the Political Code embodies substantially the same provision as section 5 of the original act.

A claim is a demand of some matter as of right made by one person upon another, to do or forbear to do some act or thing as a matter of duty.

The controller must not draw his warrant for any claim, unless it has been approved by the board, and if directed so to do it must be subject to section 682 of the Political Code, unless the direction is accompanied by a special provision exempting it from the provision of said section 672.

The statute in regard to bounties for killing coyotes may be construed to direct the controller to draw his warrant, but it does not in any way exempt it from the operation of such section.

Whatever the rule may be in cases which do not come within the technical definition of the term "claim," we are of opinion that if any force is to be given to this section in any case it applies to the present one.

The controller can never draw his warrant upon the treasurer except when directed so to do by some law; and, if such direction alone is sufficient to require it, then we at once do away with the force and effect of a salutary provision of the statute enacted as a safeguard of the treasury.

It will not do to say that the supervisors have audited <sup>129</sup> the claim, and that that is sufficient. The statute has designated the board of examiners as the body by which the audit must be made, and either such audit of a claim must be had, or a special provision exempting the claim from such audit must be contained in the direction to the controller before it becomes his duty to issue his warrant.

For this reason we are of opinion the court below erred in awarding the writ of mandate against the controller, and the judgment should be reversed and the court below directed to dismiss the writ.

BELCHER, C., concurred.

For the reasons given in the foregoing opinion the judgment is reversed and the court below directed to dismiss the writ.

DE HAVEN, J.,      GAROUTTE, J.,  
McFARLAND, J.,    HARRISON, J.

FITZGERALD, J., concurred in the judgment.

BEATTY, C. J., and VAN FLEET, J., did not participate in the foregoing decision.

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**CONSTITUTIONAL LAW—APPROPRIATIONS—WHAT ARE—DESIGNATION OF FUND.**—These and other questions relating to the appropriation of public moneys by legislative act are thoroughly discussed in the monographic note to *Carr v. State*, 22 Am. St. Rep. 638-647.

**CONSTITUTIONAL LAW.—GIFTS WHICH ARE FORBIDDEN** by the constitution of California include all appropriations of public money for which there is no authority or enforceable claim, or which rest in some moral or equitable obligation. Public moneys must be regarded as held for public purposes, and the legislature is forbidden to dispose of them except for such purposes: *Conlin v. Board of Supervisors*, 99 Cal. 17; 37 Am. St. Rep. 17, and note.

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## PEOPLE v. VERDEGREEN.

[106 CALIFORNIA, 211.]

**RAPE, ASSAULT, ASSENT OF FEMALE UNDER AGE OF CONSENT.**—If a female is of such age that sexual intercourse with her is by law deemed rape, whether she consents or not, an assault on her with intent to have such intercourse constitutes the crime of assault with intent to commit rape, notwithstanding her actual consent to the act done or attempted.

**CRIMINAL LAW.—AN ASSAULT USUALLY IMPLIES FORCIBLY** by the assailant and resistance by the assailed. If, however, the latter is made incapable of consent, the act may constitute an assault though she did not resist, but, on the contrary, assented.

*P. A. Bergerot*, for the appellant.

*Attorney General W. F. Fitzgerald and Deputy Attorney General Charles H. Jackson*, for the respondent.

<sup>212</sup> VAN FLEET, J. Defendant was convicted of an assault with intent to rape, and was sentenced to a term of years in the state prison. He appeals from the judgment.

1. The evidence disclosed that the object of the alleged assault was a girl of the age of seven years; that she went voluntarily to the room of defendant, and submitted, without resistance, to his advances. Upon this evidence defendant requested the court to charge the jury that: "In an assault with intent to commit rape there must not only be an intent to commit a rape, but that intent must be manifested by an assault upon the person intended to be ravished. The law requires both ingredients, and neither can be dispensed with. An assault implies force upon one side, and repulsion <sup>213</sup> or want of assent upon the other. An assault upon a consenting female, young or old, is a legal impossibility. Although

a child under fourteen years of age is incapable of giving a legal consent, yet if she gives an actual consent, there can be no assault. In a word, a child under fourteen years of age cannot legally consent to rape upon her, yet she may consent to an act with intent to commit it; and such attempt or act, if committed with her consent, is not an assault."

The instruction was refused, and its refusal is assigned as error.

The contention of appellant, in line with the principles announced in his requested instruction, is that there can be no such thing as an assault upon a consenting female, regardless of the fact that she may be under the age when she can legally consent to an act of sexual intercourse; that while one may be convicted of rape, or of an attempt to commit it, upon a female under the statutory age, notwithstanding her actual consent, that he cannot, under like circumstances, be guilty of an assault to commit rape, because the latter offense implies resistance on the part of the one assaulted.

In this view of the law appellant is unquestionably sustained by very excellent authority. It is so held in *State v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754, where the same question was before the court; and a like doctrine is announced in *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355, and in some English cases there cited. But such is not the view taken by this court in construing our statute upon the subject. Our code provides: "Rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of fourteen years; 2." etc., enumerating a number of other circumstances under which the offense may be accomplished: Pen. Code, sec. 261. And it is further provided that one who assaults another with intent to commit rape is punishable as for <sup>214</sup> a felony: Pen. Code, sec. 220. And it is held that the latter offense is included in the former.

In the case of *People v. Gordon*, 70 Cal. 467, the precise question here presented arose. The defendant was convicted of assault with intent to rape, committed upon a girl under ten years of age. The evidence did not disclose whether she consented or resisted, and the defendant contended that she must be held to have consented because she did not resist. This court said: "It is, however, a presumption of law that

a girl under ten years of age is incapable of consenting to the offense of rape (Pen. Code, sec. 261); and as such an offense includes an attempt to commit it, accompanied by such force and violence upon the person as constitutes an assault, a girl under ten years of age is incapable in law of consenting to the assault in connection with the attempt to commit the offense. Whether the girl in fact consented or resisted was therefore immaterial. Being incapable of consenting to an act of carnal intercourse, it was criminal for the defendant to make an assault upon her to commit such an act."

It is true that in that case the cases above relied on by appellant do not seem to have been called to the attention of the court, since they are neither cited by counsel nor referred to in the opinion; but we think the doctrine there announced more in accord with the evident purpose and intent of our statute, and that it should be adhered to.

It is the declared policy of our law, as expressed in the statute, that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse; and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. The obvious purpose of this is the protection of society by protecting from violation the virtue of young and unsophisticated girls. To hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person, made for the <sup>215</sup> express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. It is the insidious approach and vile tampering with their persons that primarily undermines the virtue of young girls, and eventually destroys it; and the prevention of this, as much as the principal act, must undoubtedly have been the intent of the legislature. The incapacity extends to the act and all its incidents.

It is true that an assault implies force by the assailant, and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where, under the law, there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her.



These principles are in keeping with the construction given to similar statutes in other states. In *Hays v. People*, 1 Hill, 352, where the same question was under discussion, Judge Cowan, speaking for the court, said: "The assent of such an infant being void as to the principal crime, it is equally so in respect to the incipient advances of the offender. That the infant assented to, or even aided in, the prisoner's attempt cannot therefore, as in the case of an adult, be alleged in his favor any more than if he consummated his purpose." The same construction was adopted by the supreme court of Michigan in *People v. McDonald*, 9 Mich. 150.

We think the offered instruction was properly refused.  
The judgment is affirmed.

GAROUTTE, J., and HARRISON, J., concurred.

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**ASSAULT UPON OR RAPE OF CHILD UNDER AGE OF CONSENT.**—Taking indecent liberties with a female child under the age of consent is an assault, notwithstanding the fact that she consented, and carnally knowing a female child under the statutory age of consent, with or without her consent, is rape: Notes to *McGuff v. State*, 16 Am. St. Rep. 30; *State v. Hows*, 32 Am. St. Rep. 692; and the extended note to *Smith v. State*, 80 Am. Dec. 365.

## DE BAKER v. SOUTHERN CALIFORNIA RAILWAY CO.

[106 CALIFORNIA, 257.]

**PLEADING—JUDICIAL NOTICE MAY AID.**—A complaint, otherwise indefinite and defective, may be aided by facts of which the court may take judicial notice, and thus sustained as against a general demurrer.

**JUDICIAL NOTICE MAY BE TAKEN OF THE BOUNDARIES OF A CITY** as described in the act of its incorporation, and also of the fact that a river flows through such city from north to south, and near its eastern limits.

**WATERS—DAMAGES FOR OBSTRUCTING BY LEVEES.**—If a levee is built in or across a natural stream, whereby its waters are diverted from their usual course, and caused to flow out of their natural channel against and upon the lands of a private person, he is entitled to recover for injuries resulting to his property.

**RECLAMATION—RIGHT OF A LANDOWNER TO CONSTRUCT WORKS OF.**—A landowner has the right to protect his lands from overflow by erecting a levee along and outside of the natural banks of a stream without incurring any liability for the effect of the consequent increase of the flow of waters upon lands of neighboring proprietors. Perhaps he may, also, in case of a stream with a wide sandy bed, have the right to reclaim a reasonable portion of it by means of a levee constructed within its banks, but has no right for such a purpose to so obstruct the channel or divert the current as to force the water into a new and permanent channel through lands of other proprietors outside of the natural banks.

**PLEADING.—ERROR OF COURT IN STRIKING OUT PART OF AN ANSWER** cannot be adjudged harmless because, on the trial of the cause, the evidence received by the court showed that the material allegations thus stricken from the pleading were false.

**WATERCOURSE—OFFICIAL BANKS OF.**—A municipal corporation cannot, by designating the lines of the official bed of a watercourse, authorize the construction of a levee thereon if such lines are in fact within the natural bed of the stream, and the levee constructed thereon would obstruct the flow of the waters, and cast them upon and against the lands of neighboring proprietors to their substantial injury.

**WATERCOURSE—JOINT LIABILITY OF MUNICIPALITY AND A PERSON CONSTRUCTING OBSTRUCTIONS THEREIN.**—If a municipality, acting as a private proprietor of lands, plans and authorizes the construction of a levee within the natural bed of a watercourse, and a contractor or other person constructs and maintains such levee, he, as well as the municipality, is answerable for the injuries resulting therefrom. An action may be maintained against either or both if the work was inherently and according to his plan and location a dangerous obstruction, such as ordinary prudence should have guarded against.

**MUNICIPAL CORPORATIONS—PUBLIC WORKS, LIABILITY FOR INJURIES RESULTING FROM.**—A municipal corporation, entitled to exercise the police power for the protection of persons and property within its limits, and also to improve the channel and banks of a river therein in any manner deemed necessary for the protection of property and of such banks, is not liable for a mere error of judgment in devising a plan, and proceeding to its execution, if its officers exercise their judgment honestly, and not maliciously, oppressively, nor arbitrarily.

**MUNICIPAL CORPORATIONS—PUBLIC WORKS, LIABILITY OF CONTRACTOR FOR CONSTRUCTING.**—Though a public work is of such a character that, because of the damage it inflicts upon private property, there is no right to proceed with it without first making compensation to the owner, a contractor executing it carefully and properly, according to the plan, is not liable for injuries resulting to the owners of neighboring property therefrom. The only liability is that of the municipality upon its obligation to compensate all damages resulting from the wrongful exercise of its power.

**EMINENT DOMAIN—TAKING OF PROPERTY, WHAT IS NOT.**—An ordinance authorizing the construction of a levee within the bed of a watercourse in a city upon a plan which must result in the obstruction of the stream, and the casting of its waters against and upon the lands of neighboring proprietors to their damage, does not constitute a taking of the property of such proprietors, or of any of them, and the ordinance, therefore, does not appear to be invalid upon its face by reason of its failure to provide compensation in advance of the doing of the contemplated work.

**DAMAGE—EXTRAORDINARY FLOODS.**—An instruction that if a levy was improperly and negligently built by the defendant, and diverted the river and the channel thereof, so as to make them run through the plaintiff's lands, it is no defense that the damage was done in time of extraordinary flood, if the danger of such a flood was known to the defendant, or could have been ascertained by inquiry, correctly states the law of the subject referred to therein.

**ACTION** against the defendant railway corporation to recover damages for injuries alleged to have been sustained from the erection of a levee and the consequent diversion of the waters of a natural stream against and upon the lands of the plaintiff. At the trial the following instructions, referred to in the opinion of the court, were, among others, asked for by the respective parties to the action:

**INSTRUCTIONS NOS. II, IV, X, AND XIII, ASKED BY PLAINTIFF:**

"II. To cause water to flow wrongfully upon another's land which would not flow there naturally is to create a nuisance, and the party creating such nuisance is liable for the damages caused thereby."

"IV. If the levee was improperly and negligently built by defendant, and diverted the river and the channel thereof so as to make them run through the plaintiff's land, it is no defense that the damage was done in the time of an extraordinary flood, if the danger of extraordinary flood was known to the defendant, or could have been ascertained by inquiry. In such case they were bound to guard against it."

"X. There is no question in this case about any permission of the city to build the levee complained of, and the jury are instructed, as matter of law, that the defendant had no right to build a levee in the bed of the Los Angeles river in such a way as to obstruct the natural flow of the river, whether in high or low water, to the injury of others, and it makes no difference that the land upon which the levee was constructed belonged to the railroad company. Although a party owns the bed of the stream, that does not entitle him to build an obstruction in the stream that will damage other lands than his own."

"XIII. It was the duty of defendant to sufficiently provide for the proper conduct and escape for the water of not only ordinary floods but also of waters of such unusual or extraordinary floods as it should have anticipated would or might occasionally occur in the future, as they had actually occurred after intervals, though of irregular duration, in the past. If, therefore, you believe that the defendant negligently failed to so provide, you will find for the plaintiff, if you find from the evidence that the plaintiff has suffered damage thereby."

**DEFENDANT'S INSTRUCTION XIV.**

"XIV. If the jury find from the evidence that the defendant, or its predecessor, was, in December, 1889, the owner of

the land lying immediately to the west of the levee, as constructed from First street to the southern patent boundary of the city, upon which it had constructed its line of railroad, then you are instructed that it had a lawful right to construct and maintain such levee or other barrier as would be necessary for the protection of such lands and railroad from the overflow of the Los Angeles river."

The court modified this instruction by adding thereto the following clause: "Provided it did not obstruct the flow in its natural channel, or divert it therefrom, to the injury of the plaintiff."

*C. N. Sterry and W. J. Hunsaker, for the appellants.*

*Wells, Monroe & Lee, for the respondent.*

**269** BEATTY, C. J. The plaintiff in this action is the owner of a large tract of land lying adjacent to and partly within the charter boundaries of the city of Los Angeles. The defendant is a railway corporation, formed by the consolidation of several older corporations, whose properties it has acquired, and whose obligations **270** it has assumed. The Los Angeles river flows through the city of Los Angeles from north to south. Ordinarily it is a small stream, and within the limits of the city is confined to a narrow channel, which sometimes flows in one place and sometimes in another, over a sandy bed about a half mile in width, which is bounded on the east by a well-defined and comparatively high natural bank, and on the west by a bank considerably lower and less plainly defined. Owing, however, to the fact that the river has its sources in the high mountains near the city, it is subject, during the rainy season, to sudden floods, which fill the entire bed of the stream, and frequently overflow its banks. Occasionally, at irregular intervals of from two to twenty years, during the last fifty years, such floods have reached an extraordinary height, carrying away dwellings and other structures erected near the banks of the stream.

The city of Los Angeles, as successor to the pueblo, the original owner of most of the lands within the charter limits, granted to one of the predecessors of defendant a strip of land, including the west bank, and a large portion of the bed of the Los Angeles river, and extending from the southern patent line of the pueblo lands (which is parallel to and about twelve hundred feet north of the southern charter line of the city), northward, along the river for a distance of sev-

eral miles. This grant also included a right of way for railway tracks along and across the streets of the city; and such tracks, with the necessary sidings, turnouts, etc., have since been laid and operated by the grantees, including the defendant.

The lands so granted, as well as other adjacent lands within the city, were, however, subject to overflow from the river floods, and one of the conditions of the grant was that the grantee should erect a levee for the protection of such lands along the western line of the tract granted down to a designated point below First street. Such levee was accordingly built by the grantee down to the point designated, and more than a <sup>371</sup> mile beyond said point to the southern charter line of the city. The line of the levee, down to the point designated in the ordinance and grant of the city, seems to have been located on or beyond the western bank of the river, and wholly outside of the river-bed. But defendant's predecessor did not stop at the point so designated. It continued the levee in a direct line to the southern charter boundary, as stated, and in so doing extended it into and across the river-bed. As so constructed, this levee, which is protected on its eastern face by piling and planking, intersects the west bank of the river, about a mile above the charter line, at a point where the river-bed curves to the west, and at its lower extremity approaches to within three hundred feet of the eastern bank, the distance between the natural banks at that point being fully two thousand three hundred feet. This levee was commenced in 1887, and completed in 1888. In January, 1890, occurred one of those unusual floods in the Los Angeles river above referred to, and the water, being prevented by the levee from spreading out over the river-bed, as it had formerly done, was directed with such force against the eastern bank, a short distance south of the charter line, that it cut a new and permanent channel through the lands on and adjacent thereto, including the tract owned by plaintiff. The damage sustained by plaintiff consisted in the washing away of a considerable acreage of land, the deposit of sand and boulders on other portions, the division of the tract into two parts, separated by the new and permanent channel of the river, destruction of fences, etc.

This action was brought for the recovery of such damages. The plaintiff had judgment in the superior court, and the defendant appeals from the judgment and an order denying its motion for a new trial.

The foregoing statement of the case is based upon the evidence adduced at the trial, and is necessary to a proper discussion of the exceptions of the defendant to the rulings of the superior court upon objections to evidence, <sup>272</sup> and in giving, refusing, and modifying instructions requested by the parties. It will also serve to illustrate some of the points involved in the assignments of error in regard to the order overruling the defendant's demurrer to the complaint and the order striking out of the original answer the principal matter of defense therein alleged, which assignments will be first considered.

The demurrer to the complaint was general for want of facts, and the principal point urged in its support is that the facts alleged do not show that the defendant, or its predecessor, violated any duty to the plaintiff, because they do not show how her land was situated in relation to the Los Angeles river, or to the levee complained of; and consequently that it does not appear from the allegations of the complaint that the builders of the levee had any reason to anticipate damage to her lands from the work in which they were engaged.

The complaint is certainly not as definite and specific in regard to the relative situation of the plaintiff's land to the defendant's levee as it might easily have been made; but with the aid of certain facts, of which the courts may take judicial notice, its deficiencies in this respect can be supplied. The boundaries of the city of Los Angeles are defined in the act of incorporation by reference to the public surveys of the United States, and the lands of plaintiff being described by reference to the same surveys, we are enabled to spell out the fact that the northwestern corner of the plaintiff's lands constituted the southeastern corner of the city according to the act of incorporation, of which, as a public act of the legislature of California, we take judicial notice. In the same way we know the relative position of the entire tract to the corporate boundaries of the city. The Los Angeles river, also, is mentioned in more than one public statute, and no doubt we may properly take judicial notice of the fact that it flows from north to south through the city of Los Angeles, and near its eastern limits.

<sup>273</sup> But, even if we cannot take notice of these facts, the complaint alleges that said river flows down through "the city." In what direction it flows is not stated, but from the allegations that it has an east bank and a west bank,

and that the obstruction of its channel and diversion of its current by a levee erected along or partly along the west bank within the city causes the river to cut through the east bank and flow across the lands of plaintiff, which, as we have seen, adjoin the city on the southeast, it may be inferred that the situation and flow of the stream are as above stated. That the words "the city," which occur several times in the complaint, mean the city of Los Angeles appears from their use in the description of plaintiff's lands in connection with boundaries which can only belong to that particular city.

As to this matter, therefore, of the relative situation of plaintiff's lands and the levee—the complaint, though lacking in directness and precision, is sufficient as against a general demurrer, and the other facts alleged make out a *prima facie* case of violation of rights of the plaintiff, which it was the duty of defendant's predecessors to regard. It is alleged in substance that for the purpose of reclaiming and securing to themselves certain lands which had theretofore been inundated, they commenced and undertook to build a levee along the western side of the Los Angeles river; that they constructed said levee in a straight line down said river from First street without regard to the bed of the stream or the channel thereof, or where the water usually flowed, thereby diverting the same into a new channel; that the river flowed down through the city; that its banks were low on the west side and high on the east; that during the rainy season the river spreads over a large area of country, especially on the west side; that the channel of the river is tortuous and irregular; that the defendant and its predecessors, disregarding the current of said river and the quantity of water usually flowing down during the rainy season, and, disregarding <sup>274</sup> the natural channel of said river, carelessly and negligently built and constructed said levee, and have since maintained it in such a manner as to obstruct the natural channel thereof and the natural flow of the water, and have so narrowed the channel as to cause the water flowing therein to diverge from its natural course and its usual flow over and upon the lands of plaintiff, by reason whereof the water so diverted did, on or about the 26th of January, 1890, begin to flow and ever since has flowed out of its natural channel, in and upon the aforesaid lands of plaintiff, and cut, destroyed, and carried away a large quantity of land, and rendered a large quantity unfit for use, covering the same with boulders and sand, and

cutting a large and deep channel through said land, where the stream continues to flow, destroying about nine hundred acres, etc. Certainly these facts, if true, gave plaintiff a right of action if the situation of her land was such as to cast any duty of guarding against damage to her upon the builders of the levee, and we think that, considering its proximity to the east bank of the river, and the fact that the actual and direct consequence of the diversion of the river was to cause it to cut and flow in a new channel across her lands, a *prima facie* case of actionable negligence was made out.

This is not like the case of *Lamb v. Reclamation District*, 78 Cal. 125, 2 Am. St. Rep. 775, and other similar cases, in which it has been held that the erection of a levee along the banks of our rivers to keep out flood waters gives no right of action to those upon whose unprotected land the flood is thereby made to rise higher. Here, according to the allegations, the levee was built in the bed of the stream, obstructing and narrowing the channel, directing the current against the opposite bank, and causing it to cut a new channel across plaintiff's lands, where it permanently flows. These facts broadly distinguish the present case from those referred to. No natural person, or corporation organized for the profit of its stockholders, has a right to inflict damage of this character upon another; and to allege that such <sup>275</sup> acts have been carelessly and negligently done is, perhaps, sufficient to show a cause of action without any showing as to the relative situation of the land and the obstruction complained of: *Stephenson v. Southern. Pac. Co.*, 102 Cal. 146. Here, however, the relative situation of the land and the levee is shown in the manner above stated, and sufficiently, in our opinion, to throw upon defendant the burden of alleging and proving due care.

The superior court did not err in overruling the demurrer to the complaint.

The demurrer having been overruled, the defendant filed an answer admitting the construction, by itself and its predecessors, of a levee along the western side of the Los Angeles river, but denying that it was constructed for the purpose of reclaiming to itself lands theretofore inundated, and denying that it was constructed in a straight line down the Los Angeles river from First street, without regard to the bed or channel of the stream, or where the water usually flowed, or



that by means thereof the water of the river was diverted into a new channel.

For a further answer, and as a special and additional defense to the action, the defendant set up a plea in substance as follows: That said levee was constructed and has since been maintained under the terms and conditions of a certain ordinance of the city of Los Angeles, for the uses and purposes therein expressed, and not otherwise, and in the manner prescribed by the city of Los Angeles through its duly constituted authorities, and on the line by said city declared to be the official western boundary of said river. That after the construction of said levee, under and in pursuance of and in accordance with the terms and conditions of said ordinance, the city of Los Angeles, by its duly constituted officers and authorities, on the twenty-sixth day of March, 1888, duly accepted said work and said levee. That, by reason of the premises aforesaid, the said city of Los Angeles is, and at all the times mentioned <sup>276</sup> in the complaint was, the owner and in possession of the said levee, and the whole thereof, and this defendant maintains the same by reason of the provisions of said ordinance and as a part of its consideration for the lands and premises conveyed to it by the city of Los Angeles, and this defendant has not now, and had not at any time since the date of said acceptance by the city, any right, title, interest, claim in, or authority over, said levee or any portion thereof, saving and excepting to keep the same in repair as required by the said ordinance, and the same is the property of the city of Los Angeles, and subject to its authority and control.

In connection with these allegations the ordinance referred to is set out in full, and also a grant of lands and rights of way from the city to defendant's predecessor, made in pursuance of the ordinance.

The following is the title of the ordinance, which was duly adopted December 8, 1886: "An ordinance to provide for the construction of a levee upon the westerly side of the Los Angeles river for the protection of property of inhabitants of said city from the high waters of said river; for the sale of city lands and grant of right of way to the Riverside, Santa Ana, and Los Angeles Railway Company for the construction of such levee."

And in the body of the ordinance it is declared that: "Said levee shall be built for the public benefit of the city of Los

Angeles, and is intended to confine the high waters of the Los Angeles river within the levee so to be constructed, and to prevent the property of the inhabitants of said city on the westerly side of said levee from being injured or destroyed in times of high flood by waters overflowing the banks of the river."

Aside from this declaration the substance of the ordinance is a grant to the railway company named in the title—one of defendant's predecessors—of a strip of land bounded on the east by the west line of the official bed of the Los Angeles river, and extending <sup>377</sup> from the southern patent line of the pueblo lands several miles into the city, together with rights of way across and along the streets of the city for its tracks, the purpose of the grant being, as declared in the ordinance, "for the laying down, operating, and maintaining" a steam railway for the transportation of freight and passengers, and for the construction of switches, turnouts, depots, and other structures necessary for the successful conduct of its business. This grant is made upon condition (along with numerous regulations and reservations for the benefit of the city and the public) that the grantee shall construct and maintain a levee along the western line of the official bed of the river from Mission street to a designated point south of First street, for which work, when completed, the railway company is to receive twelve thousand dollars in money in addition to the said grant of land and rights of way.

The deed of grant, which is also set out in full, seems to follow strictly the terms of the ordinance. It is dated April 13, 1888, the levy having been formally accepted by the city March 26, 1888.

In connection with these allegations in regard to the building of the levee for and under contract with the city, and as a part of the same defense, the defendant repeats its denials that it recklessly or negligently built or constructed said levee in disregard of the current of said river, or the quantity of water usually flowing therein during the rainy seasons, or that it maintains said levee in such manner as to obstruct the natural channel of said river, or the natural flow of the water thereof, or that it or its predecessors have narrowed the channel in such way or manner as to cause the water flowing down said channel to diverge from its natural course or its usual flow over and upon plaintiff's lands, or that,

by reason of any acts or doings of the defendant, said water was diverted or made to flow over the lands of plaintiff, etc.

With the exception of these denials all that portion of the answer setting up the ordinance of and contract <sup>278</sup> with the city, and the defense that the levee was constructed thereunder for the city and not for the defendant, was, on motion of the plaintiff, stricken out. Subsequent to the making of this order the defendant amended its answer, as so modified, by alleging, among other things, that "said levee was constructed along the western side of said Los Angeles river, as a necessity, upon its own land, for the purpose of protecting the roadbed and roadway of the said California Central Railway Company, predecessor of this defendant, and that the same was done in a workmanlike and skillful manner, with proper care, prudence, and foresight, for the purpose of preventing its tracks and roadbed from being flooded, injured, and washed away during times of flood and high water from the river, and during the time of year commonly known as the rainy season of California, and for the protection of its property, and for the safety and interest of patrons and passengers being transported over its said line."

It was upon the answer so amended (including other matters of defense not material to the present discussion) that the defendant was compelled to go to trial, and the assignment of error mainly relied upon in support of the appeal is the order of the court striking from the original answer the special defense above set forth.

The correctness of this order is to be tested by reference to the state of the pleadings at the time it was made. It cannot be supported upon the ground that subsequently the defendant amended its answer by setting up the somewhat inconsistent defense that it built the levee on its own lands for the protection of its roadbed, tracks, and other property. If both these defenses had been pleaded together in the original answer the mere fact of their partial inconsistency would not have justified the striking out of either of them: *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 213, and cases cited. Still less can the order be upheld upon the ground that the evidence at the trial did not support, or was inconsistent with, the defense stricken out. A defense which <sup>279</sup> a party is not allowed to plead is not likely to find support in the evidence offered or admitted at the trial. The question,

therefore, is whether the facts as pleaded would constitute a defense to the cause of action stated in the complaint.

The appellant contends that such facts would, for more than one reason, constitute a good and sufficient defense. In the first place it is claimed that the city of Los Angeles, for the protection of its inhabitants and their property (the declared object of the ordinance pleaded in the answer), had the undoubted right to build the levee in question, without incurring any liability for such indirect and consequential damages as the plaintiff alleges in her complaint; and, consequently, that the defendant—a mere contractor for the work—cannot be liable. In the second place, it is claimed that, even if the city became liable to compensate the plaintiff for the resulting damage to her lands, such liability rested upon the city exclusively, and in nowise attached to the defendant or its predecessors.

In considering the various questions involved in these two propositions it is to be borne in mind that the city of Los Angeles is not only a municipal corporation, and, as such, invested for local purposes with a large share of the police power of the state, as well as the privilege of invoking the power of eminent domain; it was also shown by the allegations of the plea which was stricken out to have been, at the date of the passage of the ordinance providing for the erection of this levee, the owner and proprietor of the land upon which the line of the levee was located, as well as other lands within the city, which it was one of the objects of the levee to reclaim or protect. The rights of the city in these diverse characters must not be confounded, and we will first consider its rights as owner of said lands.

It cannot be doubted that as such owner or proprietor the city had the right to protect its own lands from overflow by erecting a levee along or outside of the natural banks of the stream, without incurring any liability for <sup>280</sup> the effects of a consequent increase of the flow of flood waters upon the lands of neighboring proprietors: *Lamb v. Reclamation Dist.*, 78 Cal. 125; 2 Am. St. Rep. 775; *McDaniel v. Cummings*, 83 Cal. 515.

It may be, also, that in the case of a stream such as the Los Angeles river was shown to be by the testimony, viz., a river with a sandy bed, half a mile in width, through which, except in times of flood, the water runs in a small and insignificant stream, now in one channel and again in another, a proprie-

tor of the bed of the stream may have an equal right to reclaim a reasonable portion of such bed by means of a levee constructed within the banks; but, certainly, he could have no right for such purpose, so to obstruct the channel or divert the current as to force the water into a new and permanent channel, through the lands of other proprietors outside of the natural banks.

Did the allegations stricken from the answer show a lawful structure within this doctrine?

They were, as above shown, to the effect that the levee was erected on the west line of the "official bed" of the river, i. e., upon a line which had been declared by a city ordinance to be the western bank of the river. This, so far as the court could see, might have been the natural bank or a line very widely divergent therefrom (which in point of fact it is), and the court was therefore justified in assuming, as against the pleader, that it was not the natural bank. Upon this assumption, and in the absence of any allegations as to the character of the river and its bed, or other facts justifying the construction of a reclamation levee within the natural banks, it cannot be said that this part of the answer stated a complete defense, based upon the right of the city, as a proprietor, to protect its lands from overflow, unless its affirmative allegations were aided by the denials, with which they were coupled, of the allegations of the complaint to the effect that the levee was built in disregard of the natural channel of the stream, etc. We cannot, however, see why, in construing this part of the <sup>281</sup> answer, such denials should be disregarded. The special defense should be taken in its entirety, and, so construed, it states in effect that the levee was built by defendant for the owner of the lands upon which it was located to reclaim and protect them, and in such manner as not to interfere with the channel of the river or to divert its waters therefrom, except in so far as it might, in times of flood, cause them to overflow neighboring lands not similarly protected. This was, if true, a justification of the city, and, necessarily, of the defendant in doing work for the city. And since, for the purpose of the motion to strike out, the superior court was bound to assume that every thing alleged in the answer could be proved, it was error to grant the motion.

It is true, as above stated, that the evidence adduced at the trial not only failed to sustain this defense, but was in direct conflict with it. It showed clearly that the levee was

constructed by the defendant—apparently for purposes of its own—more than a mile beyond its southern extremity as designated in the ordinance; and it showed that this additional and unauthorized portion of the levee was the only part that encroached upon the natural bed of the stream. The maps, diagrams, and other evidence introduced by the defendant, no less than the evidence introduced by the plaintiff, all agree upon this point, and all tend strongly to show that, but for this unauthorized addition to the levee, as planned by the city, the damage to plaintiff's lands would not have occurred. But we cannot, for this reason, hold that the order striking out was harmless error. But for the order the defendant might have introduced evidence as to these matters that would have changed the aspect of the case, and we cannot assume that as the evidence is, the jury would have viewed it in the light in which it appears to us, if the case had been submitted to them upon the theory that the defense pleaded was a good defense.

Our conclusion on this point involves a reversal of the judgment, but, since the result will be a new trial <sup>252</sup> of the cause, it is necessary that we should indicate our views with reference to several other assignments of error involving questions likely to arise in the future progress of the litigation.

We cannot sustain the proposition of the appellant, that in view of the allegations of the original answer—and admitting, for the sake of the argument, that they disclosed no absolute right on the part of the city to build the levee—the only person owing any duty to the plaintiff to exercise care and skill to avoid damaging her property was the city. Conceding that the negligence complained of consisted solely in the faulty plan and location of the work, and not at all in the manner in which it was executed by the defendant, it seems to be settled by the decisions of this court that if the damage was actionable the city and the defendant would be jointly and severally liable. To place an unlawful obstruction in the bed of a stream, by which the current is directed into a new channel across another's land, makes a case clearly within the principle recently applied in *Green v. Berge*, 105 Cal. 52, 45 Am. St. Rep. 25, and in the cases therein cited. If the work was such as to make the city liable, it made the defendant liable also, and the plaintiff could maintain her action against either or both. Of course, if the city exercised such care and skill in

creating the plan and fixing the location of the work as to exempt it from any liability to the plaintiff, and the damage was wholly caused by such location and plan—no negligence being attributed to the defendant in the construction of the work, nor any departure from the plan—the defendant would be no more liable than the city. But if the work was inherently and according to its plan and location a dangerous obstruction to the river, such as ordinary prudence should have guarded against, not only the author of the plan to obstruct the stream, but the person placing the obstruction, was severally liable for the entire damage.

These questions, which have so far been considered solely with reference to the rights of the city of Los Angeles as the owner of lands subject to overflow and capable of reclamation, assume a somewhat different aspect when considered with reference to the powers and duties of the municipal corporation as a public agent for the exercise of the police power of the state.

By section 1 of article 4 of the charter of Los Angeles, which was in force at the date of the passage of the ordinance pleaded in the defendant's answer (Stats. of 1875-76, p. 697), very extensive police powers were conferred upon the corporate authorities for the protection of persons and property within the city, and by section 11, article 11, of the present constitution, which was also then in force, every municipal corporation may make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with general laws. In other words, the corporate authorities were, not only by act of the legislature, but by the direct mandate of the people as expressed in the organic law, authorized to exercise the police power of the state for local purposes. There was also in existence an act of the legislature, passed in 1868 (Stats. of 1867-68, p. 167), by which the common council of the city were empowered to levy a special tax for the purpose of creating a Los Angeles river fund, which was to be expended in such manner as the mayor and common council should direct, "in improving the channel and banks of said river in any manner deemed necessary by said mayor and common council for the protection of property on the banks of said river." Under these statutory and constitutional provisions it became the duty, as it was clearly within the power, of the corporate authorities to improve the channel and banks of the river as they might, in

the exercise of a sound discretion, deem most advantageous to the city and its inhabitants.

The work which they were called upon to perform was, like the work performed by the levee commissioners under the act of the legislature referred to in *Green v. Swift*, 47 Cal. 539, distinctly of a public character and within the police powers of the state, its design being <sup>284</sup> to protect a populous and important district of the state. The means of accomplishing this object—as in the case referred to—was confided, and in more ample measure, to the discretion of the body charged with the execution of the work, and if, in creating a plan and locating the lines of the levee, they exercised their judgment honestly, and not maliciously, oppressively, or arbitrarily, to the injury of the rights of other persons, they, the corporation and its authorities, could not be held liable for mere errors of judgment, and the persons executing the work with due care, and according to such plan, would be equally exempt from liability for any direct or consequential damage to third parties: *Green v. Swift*, 47 Cal. 539. It was error, therefore, in this aspect of the case, also to strike from the defendant's answer the matters of defense above mentioned; for although they may have been defectively pleaded in some particulars, the proper method of reaching such defects was by demurrer, and not by motion to strike out. A party who defectively pleads a good defense should be allowed an opportunity of amending his pleading.

It is suggested that in view of the provision of our present constitution (Const., art. 1, sec. 14), that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner," the doctrine of *Green v. Swift*, 47 Cal. 539, is no longer applicable to cases of this character. It is possible that this may be true, but it can make no difference in the present case whether it is true or not. Conceding, for the sake of the argument, that the effect of the constitutional provision is to make the state, or a public agency by it employed in the construction of a work designed to protect the lives and property of a large community, liable for indirect and consequential damages, such as were alleged and proved in this case, and which could not have been estimated or compensated in advance, although some damage might naturally have been apprehended, it does not follow that the contractor, executing the work carefully <sup>285</sup> and properly



according to the plan, would be liable. On the contrary, since, in the case supposed, the state or corporation would be liable, not for a tort, but only upon its obligation to compensate the damages resulting from the rightful exercise of its power, the liability would rest upon it alone, and the contractor, who has merely constructed the work carefully and properly according to the plan, will be exempt from any liability.

There was no taking of plaintiff's property in this case, either according to the facts alleged or facts found, even if tested by the doctrine of *Pumpelly v. Green Bay Co.*, 13 Wall. 166, which has been held to be an extreme case: *Green v. State*, 73 Cal. 29; *Lamb v. Reclamation Dist.*, 73 Cal. 125; 2 Am. St. Rep. 775. Neither was the damage to it the natural, certain, and immediate consequence of the facts alleged. It did not appear, therefore, that the ordinance of the city was invalid by reason of its failure to provide for compensation to plaintiff in advance of the construction of the levee.

What has been said with reference to the error of the court in the order to strike out applies to the error assigned upon the ruling, limiting the purpose for which the ordinance was admitted in evidence. Even under the pleadings as they stood at the time of the trial, the ordinance was admissible for the purpose of showing that defendant's track had been rightfully laid within the city, and, consequently, that it could protect them by a lawful and proper levee, the question whether this levee had been constructed with due care being a question for the jury.

There were some rulings of the court upon objections to evidence and in giving and refusing instructions which, although proper enough under the pleadings as they stood, would not have been proper if the defense pleaded in the original answer had not been stricken out. We need not specify these rulings more particularly, since they are sufficiently indicated by what has been said.

The court did not err in giving instruction No. IV <sup>256</sup> requested by the plaintiff. Read in connection with other instructions it could not have been understood to require the defendant to exhaust all possible sources of inquiry as to previous extraordinary floods.

Instruction No. X was not sufficiently guarded, even according to the theory upon which the case was tried.

Instruction XIII was, perhaps, erroneous in assuming as a fact the occurrence of extraordinary floods in the past, though, in view of the unanimity of the witnesses on that point, it can scarcely have been prejudicial.

There was no error in the modification made by the court in defendant's instruction XIV.

Instruction No. II asked by plaintiff seems to have been upon a point not in issue, and should have been omitted for that reason.

Aside from these particulars we see no error or inconsistency in the instructions.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

McFARLAND, J., HARRISON, J., GAROUTTE, J., and VAN FLEET, J., concurred.

**WATERS—OBSTRUCTING BY LEVEES.**—A riparian owner has no right to retain by means of a dam the waters of a natural stream running through his land, and then to discharge them in such quantities into such stream that it is insufficient to carry them and they therefore overflow the lands of a riparian proprietor below, to his injury: *McKee v. Delaware etc. Canal Co.*, 125 N. Y. 353; 21 Am. St. Rep. 740, and note. This subject is fully discussed in the extended notes to *McCoy v. Danley*, 57 Am. Dec. 686, and *Gerrish v. Clough*, 97 Am. Dec. 565.

**RECLAMATION.**—The right of riparian proprietors to build levees for the purpose of reclaiming swamp and overflowed lands is discussed in *Lamb v. Reclamation Dist.*, 73 Cal. 125; 2 Am. St. Rep. 775, and note.

**WATERS—OBSTRUCTION—FLOODS.**—One who builds a dam across a stream is bound so to construct it, that it will resist, not only ordinary freshets, but also such extraordinary floods as may be reasonably expected: *Gray v. Harris*, 107 Mass. 492; 9 Am. Rep. 61; to the same effect, *Diamond Match Co. v. New Haven*, 55 Conn. 510; 3 Am. St. Rep. 70.

**WATERS—LIABILITY FOR OBSTRUCTION OF BY ONE UNDER CONTRACT WITH CITY.**—Parties who, while constructing a conduit under a contract with the city, impair the flowing of a stream of water to the injury of a riparian proprietor are liable to him for the damages sustained during the prosecution of the work. The fact that they are acting under the direction of the city cannot excuse them: *Covert v. Cranford*, 141 N. Y. 521; 38 Am. St. Rep. 826, and note. See the extended note to *Goddard v. Inhabitants*, 30 Am. St. Rep. 411.

**MUNICIPAL CORPORATIONS—PUBLIC WORKS—LIABILITY FOR INJURIES RESULTING FROM.**—Municipal corporations are not liable for injuries resulting from the plan of a public work, as distinguished from the mode of its execution, unless such plan must necessarily result in a direct invasion of private property: *Detroit v. Beckman*, 24 Mich. 125; 22 Am. Rep. 507, and

extended note. A municipal corporation must respond in damages for its negligence in the construction or repair of public works when special injury results to a private person therefrom: *Krug v. St. Mary's Borough*, 152 Pa. St. 30; 34 Am. St. Rep. 616. See especially on this subject the extended note to *Goddard v. Inhabitants*, 30 Am. St. Rep. 379.

## COTTER v. LINDGREN.

[106 CALIFORNIA, 602.]

**PLEADING, WHEN UNCERTAIN.**—A complaint alleging that a pit in a street dug by the defendant was left without barriers or lights to warn persons of danger, on the ninth day of the month, and that an accident resulted therefrom on the tenth, but not stating whether at the latter date such pit was properly guarded or lighted or that it was in the night-time when the accident occurred, is uncertain in respect to a material matter, and a demurrer thereto on the ground of uncertainty should be sustained.

**MASTER AND SERVANT—LIABILITY OF MASTER FOR THE ACT OF A SERVANT WHEN CONTROLLED BY ANOTHER.**—If a contractor is employed, part of whose duties it is to make and guard an excavation, and before the work is commenced an arrangement is made between him and a subcontractor that the servants of the latter shall do the work under the control and supervision of the former, and they, in doing it, are guilty of negligence, their master is not answerable therefor, for as to such work, though employed by him, they are not his servants but the servants of the original contractor.

**STREETS, NEGLIGENCE IN NOT GUARDING AN EXCAVATION.**—One employed by another to make an excavation in the public street is not, after it is completed, under obligation to keep up barriers and lights to prevent injuries to the public. Such obligation, if it continues to exist, must be assumed by the person having the excavation made.

*Mahon & Laird*, for the appellant.

*R. J. Ash*, for the respondent.

604 **VANCLIEF, C.** Action for damages alleged to have been suffered by the plaintiff in consequence of negligence of the defendant in leaving unguarded an excavation which he had made in the sidewalk of a street in the town of Bakersfield, into which plaintiff fell and was injured.

The plaintiff had judgment for sixteen hundred dollars, from which, and an order denying a new trial, the defendant has appealed.

1. The appellant contends that the court erred in overruling his general and special demurrer to the complaint. The following is a copy of the complaint:

"That on or about the 9th of February, 1893, defendant,

by his servant, wrongfully dug a pit in the sidewalk of a certain highway known as 19th street, in the town of Bakersfield, Kern county, state of California, and negligently left the same open and exposed during the night-time, without any protection, barriers or lights, to warn citizens or travelers of danger.

"That on or about the 10th of February, 1893, the plaintiff was lawfully traveling on said street wholly unaware of any danger, was precipitated into said excavation without any fault or negligence on his part. Whereby his left hip was dislocated, and he was made sick & sore & lame, & was confined to his bed, & had to use crutches for a long time, & was compelled to abstain <sup>cos</sup> from work for sixty days, to his damage one hundred & twenty dollars (\$120), and he has been compelled to incur an expense of three hundred dollars in medical services, nursing, & medicines. That ever since said accident he has suffered great bodily pain and anguish of mind, & that he is stiff & lame, & his health, strength, & activity has been & will be permanently injured and impaired, to his damage in the sum of ten thousand dollars.

"Wherefore, plaintiff prays judgment against defendant in the sum of ten thousand four hundred & twenty dollars, with costs of suit."

The following are the grounds of demurrer: "1. That said complaint does not state facts sufficient to constitute a cause of action; 2. The complaint is uncertain in this: The complaint states that the said pit was dug on or about the ninth day of February, 1893, and that the same was left without protection, barriers, or lights to warn citizens of danger; the accident complained of is alleged to have occurred on or about the tenth day of February, 1893, a time subsequent to the ninth, but it is not stated that at the time of the alleged accident the said pit was not properly protected and guarded by barriers and lights sufficient to apprise persons traveling on said highway or sidewalk of danger."

I think the demurrer should have been sustained on the second ground at least.

It was essential to plaintiff's cause of action that the pit was not sufficiently guarded and lighted at the time plaintiff fell into it, but this fact is not expressly alleged, nor does it necessarily follow from the allegation that defendant negligently left the pit "open and exposed during the night-time," etc., since it is not alleged that plaintiff fell into it during

any night-time, much less during any particular night; and, therefore, it cannot be inferred that the pit was not properly guarded when he fell into it. In this respect the complaint is wholly uncertain.

2. The findings of fact are also defective in that, although <sup>606</sup> it is found that the plaintiff fell into the pit "on or about the night of February 10th," it is not found, and cannot be inferred from the findings, that the pit was not sufficiently guarded and lighted at the time he fell into it. And upon this issue the evidence was substantially conflicting.

3. Appellant further contends that the evidence does not justify the finding that defendant, by his servants, negligently or otherwise dug the pit into which plaintiff fell; and this raises the most important question in the case, which, in view of a new trial, should be decided.

The evidence without conflict proved the following facts relative to this issue:

Mr. A. Bodley contracted to build a house for Mr. Harris on Nineteenth street, in the town of Bakersfield. The contract required Bodley to furnish all the materials and to do all the work, including all necessary excavations for the foundation, with areas under the sidewalk to give light and ventilation to the cellar. Bodley entered into a subcontract with the defendant, by which the latter was to do all the brickwork, ironwork, glasswork on sidewalk and the plastering. The brickwork included walls inclosing the areas under the sidewalk. When all other brickwork was so nearly completed as not to afford work for all his employees the defendant announced to Bodley that he was ready to commence work on the area walls for which no excavations had then been made, and proposed that Bodley allow defendant's idle men to excavate the areas, for which defendant would pay their wages, to be repaid by him to Bodley. To this proposal Bodley assented, and thereupon defendant told his men to go to work on the areas, and that Bodley's foreman would show them where to dig. When they commenced Mr. Bodley himself showed them where to dig, and they dug the holes under his directions. Among other things, Bodley strictly directed them on the first day and also on the second day they worked, to put up guards around the excavations to keep people from falling in, and they promised to do so. When the <sup>607</sup> work was completed the defendant paid the men their regular wages; and as soon thereafter as Mr. Bod-

ley "came around" he repaid the defendant what he had paid the men for excavating the areas.

Although there was a sharp conflict of evidence as to whether the excavation was properly guarded at the time of the accident, a finding that it was not so guarded would be held here to have been justified.

Does the evidence substantially tend to prove that the negligence by which the excavation was left unguarded was that of the defendant is the only material question to be considered.

No evidence tends to prove that the defendant contracted to excavate the areas, nor that he controlled or had the right to control the workman while doing the work; and it does not matter that the servants who did the work were in his general employ for other purposes. Speaking of the principle of *respondet superior*, Mr. Wharton, in his work on Negligence, section 173, says: "Nor does it matter that the servant is in the general employ of third persons. Hence it is a logical inference that the principle does not cease to operate when the servant is in the employ of a third person, if released for the particular work in question": citing *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528, which is similar to this case, but extends the doctrine further than necessary to discharge the defendant here. It is well settled that, in order to hold the master responsible for the negligence of a servant, he must have the power of supervision of the servant's conduct. Indeed, the words "master and servant" imply such power. In this case the relation of master and servant did not exist between the defendant and the men who excavated the areas in the sidewalk in regard to that work; at least the evidence has no tendency to prove such relation, but the contrary.

It is also to be observed that even if the defendant, by his servants, had excavated the areas under contract, it would not have been his duty to guard them after the job was completed, unless he had agreed to do so: *Donovan* <sup>see</sup> *v. Oakland etc. Co.*, 102 Cal. 245. And there is no evidence tending to prove that the job had not been completed before the accident, while circumstantial evidence tends to prove that it had been so completed.

I think the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

GAROUTTE, J., HARRISON, J., and VAN FLEET, J.

**MASTER AND SERVANT—LIABILITY OF MASTER FOR ACT OF SERVANT WHEN CONTROLLED BY ANOTHER.**—When a master has hired a servant to another, giving the latter complete control and direction of him, with power to discharge him, the original master is not liable for his negligence though he receives pay for the work done by him: *Brown v. Smith*, 86 Ga. 274; 22 Am. St. Rep. 456, and extended note. When one person lends his servant to another for a particular employment such servant, for any thing done in that employment, must be dealt with as a servant of the person to whom he was lent, although he remains the general servant of the person who lent him: *Hasty v. Sears*, 157 Mass. 123; 34 Am. St. Rep. 267, and note.

**MUNICIPAL CORPORATION—LIABILITY FOR LEAVING EXCAVATIONS UNGUARDED.**—A municipal corporation is liable to a person who, without fault, falls into an excavation made in a public street by a contractor with the city who has neglected to provide proper guards and lights for the protection of persons passing the place: Note to *City of Olathe v. Mince*, 30 Am. St. Rep. 312. See, also, the note to *Mulvane v. South Topeka*, 23 Am. St. Rep. 708, and especially the extended notes to *Cress v. Hartmann*, 86 Am. Dec. 347, and *Sparkman v. City of Salem*, 79 Am. Dec. 704.

**MASTER AND SERVANTS.—A CONTRACTOR IS NOT LIABLE FOR THE WRONGFUL ACTS OF THE EMPLOYEES OF A SUBCONTRACTOR WORKING FOR HIM:** *McGuire v. Grant*, 25 N. J. L. 356; 67 Am. Dec. 49.

## PEOPLE v. BUTTON.

[106 CALIFORNIA, 828.]

**HOMICIDE—SELF-DEFENSE AGAINST A PERSON WHO HAS LOST HIS REASON AS THE RESULT OF AN ASSAULT UPON HIM.**—One who assaults another and so injures him as to deprive him of his reason or his capacity to receive impressions regarding the design and endeavor to cease further combat, and who subsequently kills the person assaulted, cannot be regarded as acting in self-defense, though the latter is about to make an assault upon him with a dangerous weapon after he has declined and ceased further combat, if the person so assaulted has not, because of such injuries, capacity to know and understand such cessation and declination of further combat.

**HOMICIDE—SELF-DEFENSE BY ORIGINAL ASSAILANT.**—In order for an assailant to justify the killing of his adversary he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intention to his adversary. If the circumstances are such that he cannot notify him it is the fault of the assailant, and he must take the consequences.

**HOMICIDE—ASSAILANT DECLINING FURTHER COMBAT.**—Though a person makes an unlawful assault and inflicts serious injury upon another,

yet the subsequent combat between them, though the whole consists of but one combat or assault, may assume such a form as will entitle the first assailant to act in self-defense even to the extent of taking the life of his adversary, as where after the first assault the assailant declines further combat, and such declination is known to and understood by his adversary, who, nevertheless, continues the combat and makes it necessary for the original assailant to defend himself or suffer death or great bodily injury.

*Waters & Shoup, Byron Waters, and William A. Harris, for the appellant.*

*Attorney General W. H. H. Hart, Deputy Attorney General Charles H. Jackson, District Attorney F. F. Oster, and Bledsoe & Hutchings, for the respondent.*

629 GAROUTTE, J. The appellant was charged with the crime of murder and convicted of manslaughter. He now appeals from the judgment and order denying his motion for a new trial.

For a perfect understanding of the principle of law involved in this appeal it becomes necessary to state in a general way the facts leading up to the homicide. As to the facts thus summarized there is no material contradiction. The deceased, the defendant, and several other parties were camped in the mountains. They had been drinking, and, except a boy, were all under the influence of liquor more or less, the defendant to some extent, the deceased to a great extent. The deceased was lying on the ground with his head resting upon a rock, when a dispute arose between him and the defendant, and the defendant thereupon kicked or stamped him in the face. The assault was a vicious one, and the injuries of deceased occasioned thereby most serious. One eye was probably destroyed, and some bones of the face broken. An expert testified that these injuries 630 were so serious as likely to produce in the injured man a dazed condition of mind, impairing the reasoning faculties, judgment, and powers of perception. Immediately subsequent to this assault the defendant went some distance from the camp, secured his horse, returned and saddled it, with the avowed intention of leaving the camp to avoid further trouble. The time thus occupied in securing his horse and preparing for departure may be estimated at from five to fifteen minutes. The deceased's conduct and situation during the absence of defendant is not made plain by the evidence, but he was probably still lying where assaulted. At this period of time,



the deceased advanced upon defendant with a knife, which was taken from him by a bystander, whereupon he seized his gun, and attempted to shoot the defendant, and then was himself shot by the defendant and immediately died. There is also some further evidence that deceased ordered his dog to attack the defendant, and that defendant shot at the dog, but this evidence does not appear to be material to the question now under consideration.

Upon this state of facts the court charged the jury as to the law of the case, and declared to them in various forms the principle of law which is fairly embodied in the following instruction: "One who has sought a combat for the purpose of taking advantage of another, may afterward endeavor to decline any further struggle, and, if he really and in good faith does so before killing the person with whom he sought the combat for such purpose, he may justify the killing on the same ground as he might if he had not originally sought such combat for such purpose, provided that you also believe that his endeavor was of such a character, so indicated as to have reasonably assured a reasonable man that he was endeavoring in good faith to decline further combat, unless you further believe that in the same combat in which the fatal shot was fired, and prior to the defendant endeavoring to cease further attack or quarrel, the deceased received at the hands of the defendant such injuries as <sup>as</sup> deprived him of his reason or his capacity to receive impressions regarding defendant's design and endeavor to cease further combat."

It is to that portion of the foregoing instruction relating to the capacity of the deceased to receive impressions caused by the defendant's attack upon him that appellant's counsel has directed his assault; and our attention will be addressed to its consideration. The recital of facts indicates, to some extent at least, that the assault upon deceased was no part of the combat subsequently arising in which he lost his life; yet the events were so closely connected in point of time that the court was justified in submitting to the jury the question of fact as to whether or not the entire trouble was but one affray or combat. Section 197 of the Penal Code, wherein it says, in effect, that the assailant must really and in good faith endeavor to decline any further struggle before he is justified in taking life, is simply declarative of the common law. It is but the reiteration of a well-settled principle, and in no wise broadens and enlarges the right of self-defense as

declared by courts and text-writers ever since the days of Lord Hale. It follows that the declaration of the code above cited gives us no light upon the matter at hand, and, from an examination of many books and cases, we are unable to find a single authority directly in point upon the principle of law here involved. It is thus apparent that the question is both interesting and novel.

The point at issue may be made fairly plain by the following illustrations: If a party should so violently assault another by a blow or stroke upon the head as to render that party incapable of understanding or appreciating the conditions surrounding him, and the party assailed should thereupon pursue the retreating assailant for many hours and miles with a deadly weapon and with deadly intent, and upon overtaking him should proceed to kill him, would the first assailant, the party retreating, be justified in taking the then aggressor's life in order to save his own? In other words, <sup>632</sup> did the first assault, producing the effect that it did, debar defendant (after retreating under the circumstances above depicted) from taking his opponent's life, even though that opponent at the time held a knife at his throat with deadly intent; or, putting it more concisely, did the aggressor by his first assault forfeit his life to the party assaulted? Or, viewing the case from the other side, should a man be held guiltless who without right assaults another so viciously as to take away his capacity to reason, to deprive him of his mind, and then kill him, because, when so assaulted, his assailant is unable to understand that the attacking party is retreating, and has withdrawn from the combat in good faith? In other words, may a defendant so assault another as to deprive him of his mind, and then kill him in self-defense when he is in such a condition that he is unable to understand that his assailant has withdrawn in good faith from the combat?

In order for an assailant to justify the killing of his adversary he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated, and afford no assurance to the party assailed that the need of defense is gone. This principle is fairly illustrated in Hale's Pleas of the Crown,

page 482, where the author says: "But if A assaults B first, and upon that assault B reassaults A, and that so fiercely, that A cannot retreat to the wall or other *non ultra* without danger of his life, nay, though A falls upon the ground upon the assault of B and then kills B, this shall not be interpreted to be *se defendendo*." The foregoing principle is declared sound for the reason that, though A was upon the ground and in great danger of his life at the time he killed B, still he was the assailant, and at the time of the killing had done nothing to indicate to the mind of B that he had in good faith withdrawn <sup>ess</sup> from the combat, and that B was no longer in danger. In *Steffers v. State*, 15 Ohio St. 47, 86 Am. Dec. 470, in speaking to this question, the court said: "There is every reason for saying that the conduct of the accused relied upon to sustain such a defense must have been so marked in the matter of time, place, and circumstance as not only clearly to evince the withdrawal of the accused in good faith from the combat, but also such as fairly to advise his adversary that his danger had passed, and to make his conduct thereafter the pursuit of vengeance, rather than measures taken to repel the original assault." It is also said in *State v. Smith*, 10 Nev. 106, citing the Ohio case: "A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him by his conduct that he has abandoned the contest; and, if the circumstances are such that he cannot so notify him, it is his fault, and he must take the consequences."

It is, therefore, made plain that knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless. Yet, in considering this question, the assailed must be deemed a man of ordinary understanding; he must be gauged and tested by the common rule—a reasonable man; his acts and conduct must be weighed and measured in the light of that test, for such is the test applied wherever the right of self-defense is made an issue. His naturally demented condition will not excuse him from seeing that his assailant has withdrawn from the attack in good faith. Neither his passion nor his cowardice will be allowed to blind him to the fact that his assailant is running away, and all danger is over. If the subsequent acts of the attacking party be such as to indicate to a rea-

sonable man that he in good faith has withdrawn from the combat, they must be held to so indicate to the party attacked. Again, the party attacked must also act in good faith. He must act in <sup>624</sup> good faith toward the law, and allow the law to punish the offender. He must not continue the combat for the purpose of wreaking vengeance, for then he is no better than his adversary. The law will not allow him to say, "I was not aware that my assailant had withdrawn from the combat in good faith," if a reasonable man so placed would have been aware of such withdrawal. If the party assailed has eyes to see he must see; and, if he has ears to hear he must hear. He has no right to close his eyes or deaden his ears.

This brings us directly to the consideration of the point in the case raised by the charge of the court to the jury. While the deceased had eyes to see and ears to hear he had no mind to comprehend, for his mind was taken from him by the defendant at the first assault. Throughout this whole affray it must be conceded that the deceased was guilty of no wrong, no violation of the law. When he attempted to kill the defendant he thought he was acting in self-defense, and according to his lights he was acting in self-defense. To be sure, those lights, supplied by a vacant mind, were dim and unsatisfactory, yet they were all the deceased had at the time, and not only were furnished by the defendant himself, but the defendant in furnishing them forcibly and unlawfully deprived the deceased of others which were perfect and complete. But where does the defendant stand? It cannot be said that he was guilty of no wrong, no violation of the law. It was he who made the vicious attack. It was he who was guilty of an unprovoked and murderous assault. It was he who unlawfully brought upon himself the necessity for killing the deceased. It cannot be possible that in a combat of this character no crime has been committed against the law. Yet the deceased has committed no offense. Neither can the defendant be prosecuted for an assault to commit murder, for the assault resulted in the commission of a homicide as a part of the affray. For these reasons we consider that the defendant cannot be held guiltless.

<sup>625</sup> Some of the earlier writers hold that one who gives the first blow cannot be permitted to kill the other, even after retreating to the wall, for the reason that the necessity to kill

was brought upon himself: 1 Hawkins' Pleas of the Crown, 87. While the humane doctrine, and especially the modern doctrine, is more liberal to the assailant, and allows him an opportunity to withdraw from the combat, if it is done in good faith, yet it would seem that under the circumstances here presented the more rigid doctrine should be applied. The defendant not only brought upon himself the necessity for the killing, but, in addition thereto, brought upon himself the necessity of killing a man wholly innocent in the eyes of the law; not only wholly innocent as being a person naturally *non compos*, but wholly innocent by being placed in this unfortunate condition of mind by the act of the defendant himself. We conclude, therefore, that the instruction contains a sound principle of law. The defendant was the first wrongdoer; he was the only wrongdoer; he brought on the necessity for the killing, and cannot be allowed to plead that necessity against the deceased, who at the time was *non compos* by reason of defendant's assault. The citations we have taken from Hale, the Ohio case, and the Nevada case, all declare that the assailant must notify the assailed of his withdrawal from the combat in good faith, before he will be justified in taking life. Here the defendant did not so notify the deceased. He could not notify him, for by his own unlawful act he had placed it out of his power to give the deceased such notice. Under these circumstances he left no room in his case for the plea of self-defense.

2. The court gave the following instruction to the jury as to the law bearing upon the facts of the case: "And no man, by his own lawless acts, can create a necessity for acting in self-defense, and then, upon killing the person with whom he seeks the difficulty, interpose the plea of self-defense, subject to the qualification next hereinafter set out. The plea of necessity is a <sup>226</sup> shield for those only who are without fault in occasioning it and acting under it. The court instructs the jury that "if you are satisfied that there was a quarrel between the defendant and deceased, in which the defendant was the aggressor and first assaulted the deceased by means or force likely to produce and actually producing great bodily injury to the deceased, and that the defendant thereafter in the same quarrel fatally shot the deceased, then you must find the defendant guilty, subject to this qualification."

This instruction appears to have been given subject to some qualification, and as to the extent and character of the quali-

fication the record is not plain. But, whatever it may have been, the vice of the instruction could not be taken away. The instruction is bad law; and no explanation or qualification could validate it. It is not true that the plea of necessity is a shield for those only who are without fault in occasioning it and acting under it. As we have already seen, this is the rigid doctrine declared by Sergeant Hawkins, but not the humane doctrine of Lord Hale and modern authority. The latter portion of the instruction is in direct conflict with the *Stoffer* case, already cited, where the declaration of the same principle in a somewhat different form caused a reversal of the judgment. It was there said: "If this is a sound view of the matter the condition of the accused would not have been bettered if he had fled for miles, and had finally fallen down with exhaustion, provided Webb was continuous in his efforts to overtake him. But this view is consistent with neither the letter nor the spirit of the legal principle." The instruction assumes that, if the defendant was the aggressor, the quarrel could subsequently assume no form or condition whereby the defendant would be justified in taking the life of the party assailed. The law of self-defense is to the contrary, and is clearly recognized to the contrary by the provision of the Penal Code to which we have already referred.

8. The court also gave the jury the following instruction <sup>637</sup> to guide them in their deliberations: "If you find from the evidence that, prior to the time of the shooting of the deceased by the defendant, they had a quarrel and altercation, and that the defendant stamped or kicked the deceased in the face, and that defendant thereafter really and in good faith, although he was the assailant, endeavored to decline any further struggle before the homicide was committed, and that [after the first assault had ceased, and there had an interval elapsed between said first assault and the final assault, making said assaults respectively, although in some degree related to each other, yet substantially distinct transactions, each attended with its own separate circumstances] the deceased procured his gun and made such an attempt to shoot defendant as gave the defendant reasonable ground to apprehend and fear that the deceased was about to take his life or do him great bodily injury, and that, acting under such reasonable apprehension alone, defendant shot the deceased, then you will acquit the defendant; and this will be your duty, notwithstanding the defendant may have been in the wrong

in first assailing or attacking the deceased." That portion of the charge inclosed in brackets embodied a modification of the original charge, as asked by counsel, and we think should not have been inserted. It had a tendency to mislead the jury, and the instruction was perfectly sound without it. The question as the capacity of the deceased's mind to understand and appreciate was not an element involved in this charge, and with that the court was not then dealing; but by the modification it deprived the defendant of the right to go before the jury upon the plea of self-defense if there was but one assault which led up to the homicide. The right of the defendant to act in self-defense was in no way dependent upon the commission of two assaults. If there was but one assault which caused the combat, even though that assault was a part of the combat, and was made by the defendant, still he had the right of self-defense if his subsequent conduct was such as to <sup>628</sup> indicate to the assaulted party that he had withdrawn in good faith from the struggle. The effect of the modification was to plainly intimate to the jury that, if the whole affray was but one connected quarrel or altercation, then the defendant, under no possible set of circumstances, could be justified in law in killing his adversary. This is wrong. As to the true solution of the question by the jury which the court was then discussing, it was entirely immaterial whether or not there was one or two assaults.

We think the questions we have discussed dispose of all material matters raised upon the appeal.

For the foregoing reasons the judgment and order are reversed and the cause remanded for a new trial.

BEATTY, C. J., HARRISON, J., MCFARLAND, J., and VAN FLEET, J., concurred.

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**HOMICIDE—SELF-DEFENSE BY ORIGINAL ASSAILANT.**—When defendant provokes the occasion which produces the necessity to take the life of deceased he cannot rely upon self-defense: *Levy v. State*, 28 Tex. App. 203; 19 Am. St. Rep. 828, and note; *Carter v. State*, 30 Tex. App. 944; 28 Am. St. Rep. 944, and note; note to *People v. Lennon*, 15 Am. St. Rep. 263.

**JAMESON v. HAYWARD.**

[106 CALIFORNIA, 682.]

**PARTITION—LIFE ESTATE AND REVERSION.**—Where there is an estate for years in real property held in cotenancy by the parties to the action and a reversion held by one of them only, the partition must be limited to the estate for years, and, though partition cannot be made otherwise than by sale, it cannot include the reversionary estate.

**ESTATES, MERGER OF.**—Where a cotenant of a life estate becomes the owner of the reversion equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, and an intent to keep the two estates separate will be presumed where it will best promote the interest of the person in whom they have vested.

*E. G. Knapp, W. H. Chapman, and William B. Sharp, for the appellant.*

*Estes & Miller, for the respondents.*

685 SEARLS, C. This is an action for the partition of three fifty-vara water lots in the city and county of San Francisco.

The court found that the plaintiff was the owner of an undivided tenth of an estate for years, viz., an estate for ninety-nine years, from March 16, 1851, in and to two of the three lots; that defendant George Brown is the owner of an undivided tenth interest of an estate for years, viz., an estate for ninety-nine years, in the third lot; that the defendant Alvinza Hayward is the owner of the remaining nine-tenths of said estate for ninety-nine years in all of the three lots, and is also the owner of the whole of the remainder or reversion, after the termination of said estate for ninety-nine years.

The court further found that actual partition could not be made of said property without great prejudice to the owners thereof, and ordered a sale to be made of the ninety-nine years' estate.

At the trial plaintiff introduced evidence tending to show the relative values of the said estate for years and the reversion, and also as to the value of both titles, and testimony tending to show that the two, if sold separately, would realize less than if sold together.

Testimony was also offered and rejected by the court tending to show that it would be prejudicial to the interests of the parties to sell the title for years without ordering a sale of the reversionary interest.



Plaintiff and defendant Brown thereupon requested and moved the court to ascertain and settle the proportionate value of the future right and interest claimed by the defendant Hayward in said land, which the court refused to do, and the plaintiff and defendant Brown then and there excepted to such refusal by the court.

The appeal by plaintiff is from the interlocutory judgment and decree determining the rights of the parties and from an order denying his motion for a new trial. Defendant Brown appeals from the same decree only.

By stipulation of the parties the two appeals are brought up on the same record. The sole question ~~was~~ involved in these appeals is this: Did the court below err in ordering a sale of the estate for ninety-nine years in the land in which all the parties were tenants in common, and in refusing to order a sale of the reversion of which defendant Hayward is the sole owner? The contention of appellants is that a sale of both the common property of all the parties and the exclusive interest or property of Hayward should have been decreed.

Section 752 of the Code of Civil Procedure reads as follows: "When several cotenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof according to the respective rights of the persons interested therein, and for a sale of such property or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners."

It will be observed from the foregoing section that in this state it is only the cotenants mentioned who hold and are in possession of real estate who can bring the action for partition, and it is only that real property which is thus held by them that can be partitioned. In some of the states their statutes are broad enough to include the holders of nearly every estate which can exist in lands as proper parties plaintiff in this statutory action. It is the cotenancy which gives the right to a partition. Several persons together may own a thing without being cotenants thereof, and in such a case, under a statute like our own, no partition can be had: *McConnell v. Kibbs*, 43 Ill. 12; 92 Am. Dec. 93; *Freeman on Partition*, sec. 431.

It was the evils and inconveniences of cotenancy which gave rise to the writ of partition in the English courts, and it was to avoid these detriments to full and complete enjoyment of realty that statutes have been created to enforce partition.

This court has gone to great length in upholding the <sup>1887</sup> right of a tenant in common to maintain the action where he had a right to the present possession although not in actual possession: *Martin v. Walker*, 58 Cal. 590; *De Uprey v. De Uprey*, 27 Cal. 329; 87 Am. Dec. 81; *Morenhout v. Higuera*, 32 Cal. 290; *Hancock v. Lopez*, 53 Cal. 371. *Martin v. Walker*, 58 Cal. 590, has been followed by other decisions, and is the settled law of this state upon the question involved. It does not, however, go to the extent of holding that any person having an estate in land, but not holding as a coparcener, joint tenant, or tenant in common, can maintain an action for partition. It has often been said by the courts that the first inquiry in an action for partition is, Is there such a cotenancy established as warrants the action? This question answered in the affirmative, the court must then determine the rights of the parties to the action, so far as it can be done.

The power of the court, in case a sale becomes necessary, is not greater, nor its discretion to be exercised different, than in cases where a partition is made. It would, we think, hardly be contended in this case that, if the court had ordered a partition of the rights of the parties to the property as tenants for years, that it would have been incumbent on it, or even proper, to have awarded to either plaintiff or defendant Brown any share or interest with Hayward in the reversion. It is hard to comprehend how it becomes any more proper to do so in the case of a sale.

To trace the history of proceedings for partition from an early period in the jurisprudence of England to the present time, both at law and in equity, and to note the growth and development of the action, would consume much space, and be productive of but little good. It is sufficient to say that while in this state the action is statutory, still the powers conferred upon courts by the statute are substantially those formerly exercised by the chancery courts in pursuit of the same object, and the methods employed by our code are, in the main, but a reflex of those pursued under the former equity <sup>1888</sup> practice. It is equitable practice prescribed by law. Under it property may be divided in whole or in part.

Compensation may be required of one for the greater value which he receives over that awarded to another.

The statute evidently contemplates that a given estate or interest in the property may be sold, and the residue not sold. Section 755 of the Code of Civil Procedure, which prescribes the manner of sale and the notice to be given, provides as follows: "The notice must state the terms of sale, and, if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice."

The estate for years, in which all the parties have an interest, has nearly half a century to run. Plaintiff and defendant Brown have no interest, legal or equitable, in the reversion, and no reason is perceived why a court, proceeding upon equitable principles, should enforce, at their request, the sale of the reversionary interest which does not concern them. But it is said that, when the estate for years and the reversion vested in defendant Hayward, there was a merger, and that, as to him, the estate for years has ceased to exist.

In *Dall v. Confidence etc. M. Co.*, 3 Nev. 535, 93 Am. Dec. 419, the court, by Beatty, C. J., said: "Though partition had its origin in the common-law courts, it is a subject over which the courts of equity assume almost exclusive jurisdiction, and, in disposing of the cases for partition, the equities of the respective parties growing out of their ownership of the property, as tenants in common or otherwise, are taken into consideration, and disposed of upon the broad principles which govern its courts in the administration of justice."

In consonance with these principles equity will prevent or permit a merger, as will best subserve the purposes of justice, and the actual and just intent of the parties: *McClain v. Sullivan*, 85 Ind. 174; *Fowler v. Fay*, 62 Ill. 375; *Andrus v. Vreeland*, 29 N. J. Eq. 394; *Watson v. Dundee etc. Co.*, 12 Or. 474. In other words, equity is not guided by rules of law as to merger: *Rumpp v. Gerkins*, 59 Cal. 496; *Bailey v. Richardson*, 66 Cal. 416.

In the absence of an expression of intention, if the interest of the person in whom the several estates have united, as shown from all the circumstances, would be best subserved by keeping them separate, the intent so to do will ordinarily be implied. Such is the rule enunciated in the cases cited *supra*.

It needs but little argument to show that the interests of Hayward would be jeopardized by the sale of an interest in

land vested in him, but which cannot be enjoyed by the purchaser for forty-five years; and, as no corresponding benefit is discernible to any of the parties, the court below did not err in refusing to order a sale of the reversionary interest of defendant Hayward, or in rejecting the mere opinions of witnesses in proffered testimony.

The judgment appealed from by plaintiff and defendant Brown, and the order appealed from by the plaintiff, and each of them, should be affirmed.

BELCHER, C., and HAYNES, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from by plaintiff and defendant Brown, and the order appealed from by the plaintiff, and each of them, is affirmed.

GAROUTTE, J., HARRISON, J., VAN FLEET, J.

Hearing in Bank denied. \_\_\_\_\_

**PARTITION—LIFE ESTATE AND REVERSION.**—The owners of life estates are holders in cotenancy, and as between them partition may be had, but they are not entitled to partition as against the reversioners: *Metcalfe v. Miller*, 96 Mich. 459; 35 Am. St. Rep. 617, and note. This question is especially discussed in the extended note to *Aydlett v. Pendleton*, 32 Am. St. Rep. 778.

**MERGE—ESTATE.**—An estate for years will merge in a reversionary term of years, even though the latter is of less duration: *Boykin v. Ancrum*, 23 S. C. 486; 13 Am. St. Rep. 698. See the note to *Speed v. Hans*, 15 Am. Dec. 81.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**COLORADO.**

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**CITY OF PUEBLO v. STRAIT.**

[20 COLORADO, 12.]

**MUNICIPAL CORPORATIONS—CHANGE IN STREET—DAMAGES.**—If damages are occasioned an abutting owner by an improvement, made by a municipality in the street in front of his property, whereby ingress and egress to the premises are injuriously affected, this is a kind of injury not common to the general public for which the city is liable.

**MUNICIPAL CORPORATION IS LIABLE IN DAMAGES** for an injury to abutting property caused by its building a viaduct in a street, thus obstructing ingress and egress to the premises.

**ACTION** by an abutting owner to recover damages arising from the erection of a viaduct in the street in front of his premises. Judgment for plaintiff. Defendant appealed.

*A. M. Nicholas and Dixon & Dixon*, for the appellant.

*C. E. Gast*, for the appellee.

*Arrington & McAlincy, Urmy & Crane, and J. J. McFeeley*, amici curiæ.

<sup>17</sup> **HAYT, C. J.** The question presented by this record may be stated as follows: Is a municipal corporation liable in damages for an injury to abutting property occasioned by the building of a viaduct in a public street over railroad tracks? The evidence in this case shows that plaintiff's property is located on the corner of C and Mechanic streets in the city of Pueblo; that it was improved and valuable for business purposes prior to the erection of the viaduct; that this viaduct was elevated eight feet above the old sidewalk at one end of plaintiff's property and twenty-two feet at the other, and that by reason thereof the property was closed to

access by teams from either C or Mechanic streets; that by the construction of the viaduct the property was rendered practically inaccessible, except from an alley in the rear.

That the property was damaged by the erection of the viaduct is shown by the uncontradicted evidence introduced at the trial. It is claimed by appellant that the viaduct is a necessary street improvement, and that the injury complained of is not actionable, while the appellee contends that, the injury being conceded or proven, a right of recovery is guaranteed by the following provision of our state constitution: "Private property shall not be taken or damaged, for public or private use, without just compensation": Const., art. 2, sec. 15.

This provision of the fundamental law has received consideration from this court in a number of cases. The result of these cases may be fairly summarized as follows: For injuries resulting from reasonable and ordinary or usual change and improvement of the street by the municipality the abutting owner cannot recover, provided the change or improvement is made in a careful and skillful manner for the benefit of the public: *City of Denver v. Bayer*, 7 Col. 118; *City of Denver v. Vernia*, 8 Col. 399; *Denver Circle R. Co. v. Nestor*, 10 Col. 403; *Denver etc. R. R. Co. v. Domke*, 11 Col. 247; *Gilbert v. Greeley etc. Ry. Co.*, 13 Col. 501.

<sup>15</sup> The doctrine of *damnum absque injuria* has not, however, been applied where the municipal authorities have made an unreasonable change in the street, or put it, or allowed it to be put, to an extraordinary or unusual use: See, in addition to the cases above cited, *Jackson v. Kiel*, 13 Col. 378; 16 Am. St. Rep. 207; *Town of Longmont v. Parker*, 14 Col. 386; 20 Am. St. Rep. 277.

The insertion of the word "damaged" in addition to the word "taken," first appears in the amended constitution of Illinois adopted in 1870. It has since been incorporated into the constitutions of West Virginia, Pennsylvania, Arkansas, Missouri, Alabama, Nebraska, Texas, Georgia, California, Colorado, Kentucky, Montana, and the Dakotas. In a majority, if not all, of these states, except Colorado, where a construction has been had, the courts have given the provision a literal interpretation, allowing a recovery in all cases where private property has sustained substantial damage by the making of a public improvement. We shall not undertake to cite the cases supporting this conclusion, as the num-

ber forbids it. Reference to a majority of such cases may be found in the recent case of *Brown v. City of Seattle*, 5 Wash. 35. In that case, after review of the authorities, the conclusion is stated as follows:

"Every court in which the point has been raised has decided in favor of the private citizen, but, were it now presented to us for the first time in the history of the phrase, we should not be disposed to view it in any way different from that expressed in the cases we have cited. If private property is damaged for the public benefit the public should make good the loss to the individual. Such always was the equity of the case, and the constitution makes the hitherto disregarded equity now the law of it."

*City of Denver v. Bayer*, 7 Col. 118, is the leading case in this state upon the question. Although the right of recovery was somewhat restricted from the rule announced in Illinois and some other states, it was expressly held that the word "damaged" was inserted in the constitution for a purpose, which purpose was to add an additional right of action.

<sup>10</sup> In Colorado the right of recovery has been limited to those unusual uses to which but few streets are subjected. This construction has been influenced to some extent, no doubt, by the peculiar wording of our constitution under which just compensation is also required where private property is damaged for private use. This novel provision is relied upon by the writer of the opinion in *City of Denver v. Bayer*, 7 Col. 118, Mr. Justice Helm, in *Denver Circle R. Co. v. Nestor*, 10 Col. 424, 425, as a ground for qualifying the rule announced in other states. The opinion concludes as follows:

"A distinction was, in my judgment, intended between those uses to which every street is primarily and necessarily dedicated, and those extraordinary uses which are tolerated in but very few, probably not more than one in a hundred, of the many streets required for its convenience by the local public."

The court as then constituted, while expressly refusing to extend the recovery in accordance with the rule in Illinois and a few other states in which the provision had at that time received judicial consideration, was of opinion that it was a recognition of a new right of action not necessarily known to the common law. And this principle has been recognized since in several of the cases cited.

In the *Bayer* case a right of recovery was recognized for

any injury or annoyance occasioned by a railroad to an abutting property owner, injuriously affecting his property without injuring that of his neighbor, and it was held that the owner of property abutting on a street had a special property—an easement in the street not common to the general public, that entitled him to free ingress and egress from the street to his property, and that if such easement was taken away or injuriously affected he was entitled to just compensation therefor.

In the case of *Jackson v. Kiel*, 13 Col. 378, 16 Am. St. Rep. 207, a railroad company was held liable for damages occasioned by blockading the space or intersection with another street, thereby preventing <sup>20</sup> ingress and egress to plaintiff's property for a considerable portion of the time.

In *Town of Longmont v. Parker*, 114 Col. 386, 20 Am. St. Rep. 277, it was decided that the owner of abutting property had rights in the street not shared by the general public, and that if the highway was obstructed or impaired as a means of ingress or egress to his property the abutting owner was entitled to recovery for the depreciation of the value of his property occasioned thereby: See, also, *Union Pac. Ry. Co. v. Foley*, 19 Col. 280.

Under these decisions the plaintiff is entitled to recovery in this class of actions in cases where the damages suffered are different in kind from those suffered by the general public, while a recovery is denied for those damages common to all. And when damages are occasioned an abutting owner by an improvement in the street in front of his property, whereby ingress and egress to the premises is injuriously affected, this is a kind of injury not common to the general public.

By the fourth defense it is alleged, in substance, that the viaduct was a reasonable and proper street improvement, and it is claimed that this constituted a complete defense to plaintiff's action. This claim is not supported by the decided cases in jurisdictions having a constitutional provision similar to the one under consideration.

In the case of *Rigney v. City of Chicago*, 102 Ill. 64, like arguments were advanced to those urged by appellant. The conclusion was, that the building of a viaduct in a public street by the city rendered the city liable in damages to the owner of abutting property, where the effect was an impairment of some right which the private owner enjoyed in con-



nection therewith; such, for instance, as the right of ingress to and egress from the same. Although the result was concurred in by only a bare majority of the court it has since been recognized as the settled law in the state of Illinois.

In *Chicago v. Taylor*, 125 U. S. 161, also a viaduct case, the supreme court of the United States reached a similar conclusion without a dissent. Although this result may have been influenced by the prior decisions of the state court, the <sup>21</sup> opinion declares that the constitutional provision could have been inserted with no other intention than that expressed by the state court.

The case of *Selden v. City of Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278, is not necessarily opposed to the foregoing views, the decision in that case being based upon a constitutional guaranty that private property shall not be "taken" or "appropriated" without compensation. It was held that this provision did not embrace mere consequential damages resulting to property abutting on a street, from a change of grade of the street or other improvement thereof made by municipal authorities acting within the scope of their charter powers, but only to a trespass upon or physical invasion of the property.

It is not necessary to question the correctness of the foregoing decision, based as it is upon a dissimilar constitutional provision from that here in force. It is not controlling under the peculiar provisions of our constitution. Moreover, it narrows the right of recovery within limits not universally recognized, even where constitutional provisions are in force similar to that found in the state of Florida: *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154.

A strict application of this rule would hold the dedicator as having consented to a use of the street that totally destroys the value of his property, although no human foresight could have anticipated such an unusual use. Under it the results of a life of toil and frugality, if invested in town or city property as a provision for old age or dependent families, might be lost as a result of an improvement erected for the benefit of the general public. The rule is certainly more reasonable and just which requires compensation to be made by the municipality out of the common fund, for an injury occasioned by an improvement for the public convenience, than to require the individual to suffer the entire loss.

Moreover, the constitutional provision in force in this state

is remedial in character and for the purpose of giving property holders additional security, and under well-settled canons<sup>23</sup> of construction it should be liberally construed: *Denver Circle R. Co. v. Nestor*, 10 Col. 403; *Boyd v. United States*, 116 U. S. 616.

We think the building of a viaduct in a public street is such an extraordinary use of the street as could not have been reasonably anticipated at the time of the dedication. And, under constitutions like ours, both principle and authority unite in support of the rule allowing the owner of abutting property to recover damages when the means of ingress and egress to his property is obstructed or injured thereby.

It follows that the facts alleged as a fourth defense constituted no defense to plaintiff's action, and the defense was therefore properly stricken out. Nothing remained for the jury to determine but the amount of the damages. It is not claimed that the damages allowed are excessive, and the judgment is accordingly affirmed.

Affirmed.

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**ABUTTING OWNERS—DAMAGES FOR OBSTRUCTION TO STREET IN FRONT OF PROPERTY.**—The owner of a lot fronting on a street, though he has no title in any part of the lands upon which such street is located, may sustain an action to recover damages resulting to him from an obstruction of the street, impairing in a substantial degree the light or accessibility of his premises, or otherwise causing him damage or annoyance: *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461, and note; *Town of Longmont v. Parker*, 14 Col. 386; 20 Am. St. Rep. 277, and note. This question will be found further discussed in the notes to *Jones v. Erie etc. R. R. Co.*, 31 Am. St. Rep. 734; *Jackson v. Kiel*, 16 Am. St. Rep. 209; *Western Union Tel. Co. v. Williams*, 19 Am. St. Rep. 918, and the extended note to *Callanan v. Gilman*, 1 Am. St. Rep. 840.

**MUNICIPAL CORPORATIONS—CHANGE IN STREET—DAMAGES TO ABUTTING OWNER.**—A municipal corporation has no power to authorize private persons or corporations to erect or maintain permanent obstructions in the public streets for purely private purposes: *Savage v. Salem*, 23 Or. 331; 37 Am. St. Rep. 688, and note. No action will lie for an obstruction in a public street if it does not practically affect the use and enjoyment of neighboring property and thereby impair its value: *Barrows v. City of Sycamore*, 150 Ill. 588; 41 Am. St. Rep. 400, and note. See, also, the note to *Theobald v. Louisville etc. Ry. Co.*, 14 Am. St. Rep. 562.

## PIERCE v. CONNERS.

[20 COLORADO, 178.]

**NEGLECT—MASTER AND SERVANT—PROXIMATE CAUSE.**—It is negligence for which the master is responsible for his servant while intrusted by him with his team of high-spirited horses to leave them unhitched and uncared for by the side of a public highway.

**NEGLECT—DEGREE OF CARE AND DILIGENCE REQUIRED FROM CHILD** of tender years is not as high as that required from an adult of presumed judgment and discretion.

**DAMAGES FOR DEATH OF CHILD—EVIDENCE.**—In an action to recover for the death of a minor child, evidence of the nature of the child's services from the time of its death until it became of age is admissible, though the recovery is not necessarily limited to the value of such services.

**NEGLECT—DEATH BY WRONGFUL ACT.—MEASURE OF RELIEF** in an action to recover for death caused by negligence is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased. The recovery allowable is in no sense a *solatium* for the grief caused by the death of a relative or friend, but it is only for the pecuniary loss to the living party entitled to sue.

**NEGLECT—DEATH BY WRONGFUL ACT.—DAMAGES TO BE AWARDED** for a death caused by negligence may be approximated by considering the age, health, condition in life, habits of industry, or otherwise, and ability to earn money on the part of the deceased, including his or her disposition to aid or assist the plaintiff.

**PARENT AND CHILD—PARENT ENTITLED TO SUE FOR DEATH OF CHILD.**—The father and mother may join in an action to recover for the death of their minor child caused by negligence. Such joinder is permissive, not imperative. Either parent may sue alone.

**PARENT AND CHILD—PARTIES TO ACTION TO RECOVER FOR DEATH OF CHILD.** The application of a parent to be made a party with the other parent to a suit to recover for the death of a minor child caused by negligence may be presented and granted at any time, even after judgment, or after review in the appellate court, for the purpose of protecting the interest which such parent may have in such judgment.

**PARENT AND CHILD.—JOINDER OR NONJOINDER OF PARENT** in an action to recover for the death of their minor child, caused by a negligent or wrongful act, is material only to the parents. Either or both may sue. The grounds and measure of recovery are the same in either case, and the defendant cannot be prejudiced whichever course is pursued, nor can he be subjected to more than a single suit thereby.

**ACTION** by a father to recover for the death of his minor child, caused by negligence. Judgment for plaintiff. Defendant appealed.

*A. S. Weston*, for the appellant.

*A. S. Blake and A. J. Sterling*, for the appellee.

179 **ELLIOTT, J.** The overruling of the general demurrer to the complaint is assigned for error.

<sup>180</sup> 1. Among other things the complaint states in substance that defendant, Pierce, owned and kept a team of horses; that the horses were fiery and fractious; that while they were in charge of a driver employed by defendant for the purpose of delivering lumber to his customers, and engaged in that business, the driver left them standing by the roadside without being hitched or secured in any way, and without any person to hold or take care of them; and that, while they were thus left unhitched and uncared for, they ran away.

The complaint further shows that Mary Ellen Connors, daughter of plaintiff, a child about seven years old, was on the street at the time defendant's team ran away; that she was upon the path usually traveled by people going afoot along said street, and was not in that part of the road used by wagons and carriages; that, while on said path and out of the way of teams passing along the road, defendant's team running away as aforesaid came along the road, and coming near another team hauling a heavily loaded ore-wagon, made a bound off the road and up on the bank or path where the child was, and struck her and thereby knocked her down into the road where she was struck and crushed by the wheel of the ore-wagon, and thereby injured so that from the injuries thus received she died a few days thereafter. It is unnecessary to state further in detail the averments of the complaint, the facts alleged were sufficient in substance to constitute a cause of action, and the demurrer was properly overruled.

2. The evidence sustained plaintiff's cause in substance as alleged. The horses were a spirited, high-lived team; it was negligence to leave them unhitched and uncared-for by the side of the public highway. This act of negligence was committed by the servant while intrusted with his master's team, and employed in and about his master's business. It was an act within the scope of his employment; and, hence, the master was responsible for the negligence. So, too, leaving the horses unhitched and uncared for, whereby they ran away and drove or knocked the child under the wheel of the ore-wagon was the proximate cause of the injury. The fact <sup>181</sup> that the injury was inflicted by the ore-wagon does not relieve the party responsible for the original act of negligence. The evidence does not disclose any negligence on the part of the driver of the ore-wagon. Neither does the fact that the Hannen boy took hold of the lines of defendant's team and

so caused them to start and run away, relieve the party liable for the original act of negligence; the age of the boy has not been disclosed on this appeal; the father in testifying spoke of the boy as a "kid"; the driver should have so secured the horses that a mere child could not have thus caused them to run away.

3. Nothing in the evidence tends to show that the Connors child was guilty of contributory negligence; she was upon the usually traveled footpath by the side of the public highway in a rural neighborhood; she was where she had a right to be, and the evidence does not show that she did any thing amiss. It is true an adult person might have escaped, but the law does not exact the same degree of care and diligence from a child of tender years that it does from an adult person of presumed better judgment and discretion. All the facts of the case are practically undisputed, and the law applicable thereto is purely elementary: *Shearman and Redfield on Negligence*, sec. 10; 2 *Thompson on Negligence*, 1140.

4. The trial court did not err in admitting evidence of the value of the services of a girl like the deceased from the age of seven years to the age of eighteen, though the law does not necessarily limit the recovery to the value of such services. The act of 1877 (Gen. Laws, 343), under which this action was brought, fixes the maximum limit of recovery in cases of this kind at five thousand dollars, and the damages allowable under section 3 are compensatory, not exemplary or punitive. This subject was much considered in *Moffatt v. Tenney*, 17 Col. 189, and again in *Hayes v. Williams*, 17 Col. 468. In each of the foregoing cases the action was by the wife for damages resulting to her from the death of her husband. But in *Denver etc. Ry. Co. v. Wilson*, 12 Col. 20, the action was by the father and mother for damages <sup>183</sup> resulting to them from the death of their son, a young man twenty-five years of age, and unmarried; and it was said the parents were entitled to recover "their pecuniary loss" resulting from the death of their son: See, also, *Orman v. Mannix*, 17 Col. 564; 31 Am. St. Rep. 340.

5. The true measure of compensatory relief in an action of this kind, under the act of 1877 (Gen. Laws, 343), is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of the defendant. Such sum will depend

on a variety of circumstances and future contingencies, and will, therefore, be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated in considering the age, health, condition in life, habits of industry or otherwise, ability to earn money, on the part of the deceased, including his or her disposition to aid or assist the plaintiff; not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts, may be taken into consideration. But it must be borne in mind that the recovery allowable is in no sense a *solatium* for the grief of the living occasioned by the death of the relative or friend however dear. It is only for the pecuniary loss resulting to the living party entitled to sue resulting from the death of the deceased that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law.

From a careful consideration of the rulings of the court at the trial and the instructions to the jury no substantial error appears. The rulings and instructions were as favorable to defendant as the law required.

6. Only one further assignment of error requires discussion. The question arose as follows:

Defendant's answer specially alleged a defect of parties plaintiff in this, that "the wife of the plaintiff and the <sup>1st</sup> mother of the deceased, Mary Ellen Connors, is living, and that she has a joint and equal interest with the plaintiff in the subject matter of the action, and in whatever judgment may be recovered therein." The replication did not deny that the mother was living, but denied that she had an equal interest or any interest whatever in the subject matter of the suit, or in any judgment which might be recovered. Such denial presented a peculiar issue, which should have been determined, if at all, before the trial was entered upon. But it does not appear that the attention of the trial court was called to the state of the pleadings in this respect, until after the taking of testimony was commenced before the jury. A certain question was then propounded to the plaintiff, as a witness, and was objected to on the ground that the mother had not been made a party. The court overruled the objection, and this ruling is assigned for error.

The statute giving the right of action in cases of this kind

designates the party or parties entitled to sue. It provides, *inter alia*, that, if the deceased be a minor or unmarried, the suit is to be brought "by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor": Gen. Laws 1877, p. 343.

The true reading of the statute is "father and mother"; such is the language of the first official publication, and such is the language of the enrolled bill in the office of the secretary of state, though in General Statutes of 1883, section 1080, and also in Mills' Annotated Statutes, section 1508, the reading is "father or mother."

It is true the code requires that every civil action, except as otherwise provided in the code itself, shall be prosecuted in the name of the real party in interest; also, that those who are united in interest shall be joined as plaintiffs or defendants, and that if a party who should join as plaintiff will not do so, he may be made a defendant, the reasons therefor being stated in the complaint: Code, secs. 3, 12. But section 9 of the code (original section 10) provides that <sup>184</sup> "a father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child." All these provisions of the code were originally enacted ten days subsequent to the passage of the damage act, *supra*; and were also re-enacted ten years afterwards: See damage act, *supra*, approved March 7, 1877; original code, approved March 17, 1877; also code of 1877.

The plea of defect of parties in this case was not a plea in bar, nor was it sufficient to abate the action; it could have been avoided at any time by bringing in the mother as a party either as plaintiff or defendant: Code, sec. 16. But was it error to disregard the plea and the objection to testimony, without requiring the mother to be joined as a party?

7. The provisions of the damage act and of the code above mentioned being to a certain extent *in pari materia*, are to be construed together. The task is difficult, the provisions being peculiar and somewhat incongruous. Our conclusions, however, are that, while the father and mother may join in a suit of this kind, it is not essential that they should so join. The joining of the father and mother appears to be permissive, not imperative. It is clear that under certain circumstances one parent has the right to sue alone. In general the better practice is for the parents to join, since the statute

permits them to do so; and, where a parent not joined applies to be made a party, such application should be granted, unless resisted upon some legal ground—as that such parent has deserted his family—and such application may be presented at any time, even after judgment, or after review in an appellate court, for the purpose of protecting the interest which the party so applying may have in the judgment recovered. For it is to be observed that, while the code permits the father, and, under certain circumstances, the mother, to sue alone, it does not deprive the parent not joined of that equal interest in the judgment which the damage act says each shall have; nor is there room for inference that either parent is to be so deprived, except in case of a parent deserting the family.

<sup>185</sup> In this case the mother made no application to be joined as a party in the lower court. It may be supposed, therefore, that she was then willing that her husband should sue for her interest as well as for his own. If this supposition be wrong, or if the mother now desires to have her equal interest in the judgment protected, she may apply therefor upon the remanding of this cause.

The wife, though a proper party, was not a necessary party. The plea of nonjoinder being interposed by the defendant, was not, therefore, fatal to the maintenance of the action; and the court did not err in overruling defendant's objection and in proceeding with the trial, notwithstanding such plea. If the objection had come from the mother a very different question would have been presented.

8. The conclusion at which we have arrived can work no hardship to the defendant. The joinder or nonjoinder of a parent in an action of this kind is material only to the parents themselves. Since either or both may sue, the defendant cannot be affected or prejudiced whichever course they may take; the grounds and measure of recovery are the same in either case, and the defendant can only be subjected to a single suit.

The judgment of the district court is affirmed and the cause remanded.

Affirmed.

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**MASTER AND SERVANT — MASTER'S LIABILITY GENERALLY TO THIRD PERSONS FOR SERVANT'S NEGLIGENCE.**—A master is civilly liable for the negligence of his servant committed in the course of his employment and resulting in injury to a third person: *Osborne v. McMasters*, 40 Minn. 103;



12 Am. St. Rep. 698, and note; *Zulke v. Wing*, 20 Wis. 408; 91 Am. Dec. 423, and note. See, on this subject, the extended note to *Blake v. Ferris*, 55 Am. Dec. 317-321.

**NEGLIGENCE—DEGREE OF CARE REQUIRED OF CHILDREN.**—A child is held to such care and prudence only as are usual among children of his age and capacity: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note; *City of Pekin v. McMahon*, 154 Ill. 141; 45 Am. St. Rep. 114.

**NEGLIGENCE CAUSING DEATH—MEASURE OF DAMAGES.**—The true measure of damages for wrongful death is the pecuniary loss suffered without any solatium for mental suffering or grief; and the pecuniary loss is what the deceased would probably have earned by his labor in his business or profession, and which would have gone to support his family. In fixing this amount consideration should be given to the age of the deceased, his health, his ability, and disposition to labor, his habits of living, and his expenditures: *McHugh v. Schlosser*, 159 Pa. St. 480; 39 Am. St. Rep. 699, and note. See the monographic note on this subject to *Louisville etc. Ry. Co. v. Goodykoontz*, 12 Am. St. Rep. 375.

**NEGLIGENCE CAUSING DEATH OF A MINOR CHILD—DAMAGES.**—In an action by a parent for the death of a minor child the main element of damage is the probable value of the services of the deceased until he attains his majority, considering the cost of his support and maintenance during the early and helpless part of his life: *Morgan v. Southern Pac. Co.*, 95 Cal. 510; 29 Am. St. Rep. 143. See, to the same effect, *Texas etc. Ry. Co. v. Brick*, 83 Tex. 526; 29 Am. St. Rep. 675, and note.

**PARENT AND CHILD—RIGHT OF PARENT TO RECOVER FOR NEGLIGENT INJURY TO CHILD.**—A widowed mother with whom a minor child lives, and by whom it is supported, and for whom the child works as a member of the family, is entitled to recover for the loss of services of the child, and for labor performed, and for expenses reasonably incurred in its care, so far as they are the consequences of an injury to the child negligently caused by the defendant: *Horgan v. Pacific Mills*, 158 Mass. 402; 35 Am. St. Rep. 504, and note.

## AMERICAN WATER WORKS COMPANY v. FARMERS' LOAN & TRUST COMPANY.

[20 COLORADO, 208.]

**CORPORATIONS—BY WHAT LAW GOVERNED.**—A corporation is governed by the laws of the state or sovereignty under and by virtue of which it has been created. Though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers whenever it undertakes to exercise them.

**CORPORATIONS—JUDGMENTS AGAINST—EXTRATERRITORIAL EFFECT OF.**—After a corporation has been adjudged insolvent in the state of its creation, and placed in the hands of a receiver, with full power to control and manage its affairs, and its officers, directors, agents, and attorneys have been enjoined from in any manner continuing its business, and from attempting to use its name, privileges, or franchises for any

purpose, an officer of such corporation cannot, against the objection of such receiver, use its name to prosecute a writ of error in another state.

**STATUTES—EXTRATERRITORIAL EFFECT OF.**—Although the laws of a state do not have any extraterritorial force as mere laws, yet things done in one state, in pursuance of the laws of that state, are to be regarded as valid and binding in other states.

MOTION to dismiss a writ of error.

*Teller, Orahood & Morgan*, for the plaintiff in error.

*Wolcott & Vails*, for the receiver.

288 ELLIOTT, J. By the petition to dismiss the writ of error, the answer thereto, and the agreed statement of facts filed in connection therewith, all matters essential to the determination of this motion are admitted.

1. A corporation is a creature of the law. It is always subject to the law of its charter, or, if it has no special charter, then to the incorporation laws of the state or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity or disability of a corporation in a given case, regard must primarily be had to the laws of the state or sovereignty from which it has derived its franchises: See *Canada Southern Ry. Co. v. Gebhard*, 109 U. S. 527; also *Bank of Augusta v. Earle*, 13 Pet. 585, et seq., and cases there cited.

2. It appears that plaintiff in error is a corporation duly organized under and by virtue of the laws of the state of New Jersey. From the agreed statement of facts it appears that plaintiff in error, prior to the suing out of the writ of error in this cause, had become an insolvent corporation, and had been so adjudged by a court of competent jurisdiction in the state of New Jersey; that by the judgment of said court under the laws of said state the petitioner E. Hyde Rust had become the duly appointed and qualified receiver of said corporation<sup>210</sup> with full powers to control and manage its affairs; and further, that plaintiff in error as a corporation, its officers, directors, agents, and attorneys, and each and every of them, had been absolutely enjoined from in any manner continuing the business of said corporation, or from attempting to use its name, privileges, or franchises for any purpose whatever.

There is nothing in the petition, answer, or agreed statement of facts to show that plaintiff in error, or Mr. Venner, as one of its vice-presidents, has ever been relieved from the disabilities of said injunction, or that they, or either of them, have any power or authority to prosecute the writ of error herein. It seems clear that Mr. Rust, as receiver of the plaintiff in error, is justified in pleading the laws of New Jersey relating to insolvent corporations and the decrees of a court of competent jurisdiction of that state based thereon, in support of his motion to dismiss the writ of error herein. Such laws and decrees are admitted to be correctly set forth in the petition.

3. Against the granting of this motion to dismiss it is urged that the laws of a state have no extraterritorial force. It is also urged that the receiver of a corporation cannot exercise his powers as such beyond the jurisdiction of the court appointing him. Conceding that the laws of a state do not have any extraterritorial force, as mere laws, nevertheless, the general rule is that things done in one state, in pursuance of the laws of that state, are to be regarded as valid and binding in other states. Moreover, Mr. Rust, by his petition to dismiss this writ of error, is not seeking to transact business or do any affirmative act by virtue of his authority as receiver of the corporation; on the contrary, he seeks to prevent the corporation of which he has been invested with exclusive control from doing an affirmative act contrary to the laws of the state from which such corporation has derived its powers, and contrary to the judgment of a court having full jurisdiction in the premises; in other words, he seeks to prevent Mr. Venner from making an unauthorized use of the name of such corporation. In taking this course Mr. Rust is undoubtedly <sup>211</sup> acting within the scope of his authority as the duly appointed and qualified receiver of plaintiff in error: *Relife v. Rundle*, 103 U. S. 225; *Bockover v. Life Assn. of America*, 77 Va. 85.

An extended discussion of the legal questions involved in this motion seems unnecessary. Whatever may be the grievances of Mr. Venner it is clear that he is not entitled to use the name of plaintiff in error in the further prosecution of this writ.

The motion to dismiss must be sustained.  
Dismissed.

**CORPORATIONS—BY WHAT LAW GOVERNED.**—The power of a corporation to act in a foreign country or in another state depends upon the law of the country of its creation and on the law of the place where it assumes to act. It has only such powers as were given to it by the authority which created it, and it cannot do any act by virtue of those powers in any country or state where the law forbids it so to act: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194, and note. Every power which a corporation exercises in a state other than the one in which it was created depends for its validity upon the laws of the former state: *Phanks Ins. Co. v. Commonwealth*, 5 Bush, 68; 96 Am. Dec. 331, and extended note. See the discussion of this subject in the notes to *Young v. South Tredegar Iron Co.*, 4 Am. St. Rep. 760, and *Deringer v. Deringer*, 1 Am. St. Rep. 160.

**STATUTES—EXTRATERRITORIAL EFFECT OF.**—The laws of a state can have no force *propria vigore* outside of that state: *Falls v. United States Sav. etc. Co.*, 97 Ala. 417; 38 Am. St. Rep. 194. To the same effect see *Alabama etc. R. R. Co. v. Carroll*, 97 Ala. 126; 38 Am. St. Rep. 163, and note, with the cases collected.

## WOOD v. DENVER CITY WATER WORKS COMPANY.

[20 COLORADO, 263.]

**INTERVENTION.**—**INTEREST WHICH ENTITLES PERSONS** to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation of the judgment.

**INTERVENTION.**—**AVERMENTS OF PETITION** so far as they are well pleaded must be taken to be true in determining whether an application to intervene should be allowed.

**INTERVENTION — INTEREST IN SUIT.**—If a water company, claiming the exclusive right to furnish a certain town and its inhabitants with water for domestic and other uses, brings an action for an injunction against another water company to restrain it from furnishing such water, residents of such town who have taken steps to procure water from the defendant company and who have expended large sums of money, in digging trenches and laying pipes connecting their residences with the water-mains of such company, and who allege that they cannot obtain a supply of pure water from the plaintiff company, are entitled to intervene therein.

**ACTION** by the Denver City Water Works Company, claiming the exclusive right to furnish the town of Highlands with water for domestic and other uses, against the Citizens' Water Company to obtain an injunction restraining the latter company from furnishing said town with water for the purposes mentioned. L. H. Wood and others applied by petition to intervene. Their petition was denied and they bring the cause to this court by writ of error.

*Thomas & Thomas*, for the plaintiffs in error.

*Hartzell & Patterson*, for the defendants in error.

<sup>288</sup> ELLIOTT, J. The action of the district court denying petitioners' application to intervene, is assigned for error. The conditions under which a party is entitled to intervene in a civil action, by virtue of section 22 of the code, have already received the consideration of this court.

In *Henry v. Travelers' Ins. Co.*, 16 Col. 179, it was held that "the interest which entitles a person to intervene in a suit between other parties must be in the matter of litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." And that, "in determining whether an application to intervene should be allowed, the averments of the petition, so far as the same are well pleaded, must be taken as true": See, also, *Morey v. Lett*, 18 Col. 128, and authorities there cited; also *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569.

From the complaint in this action, as well as from the petition of intervention, it appears that the defendant (The Citizens' Water Company) was organized to supply water for domestic and other purposes to the city of Denver and towns adjacent thereto, and to the inhabitants thereof. From the petition it further appears that petitioners, with their families, were citizens and residents of the town of Highlands, <sup>287</sup> a town adjacent to the city of Denver. The petition further shows that petitioners had taken steps to procure from the defendant company a supply of pure water for domestic purposes; that petitioners had expended large sums of money in digging trenches and in laying service pipes connecting their respective residences with the water-mains of the defendant company; and further, that they could not obtain a pure supply of water from the plaintiff company.

It is unnecessary to set forth in detail the averments of the complaint or of the petition. They may be found in the statement preceding this opinion. The injunction suit by the plaintiff company against the town of Highlands, referred to in the complaint and petition, is obviously the same case afterward reviewed by this court, in which the granting of the injunction against the municipality was held to be erroneous. The pendency of said suit, therefore, can no longer be considered as giving any support to the plaintiff company's claim in this action: See *Lewis v. Denver etc. Water Works Co.*, 19 Col. 236; 41 Am. St. Rep. 248.

Taking the averments of the petition to be true, it is clear

that petitioners did have an interest in the very matter in litigation. It was a matter of vital importance to them whether they were to be permitted to procure a supply of pure water from the defendant company, or whether they were to be prevented from so doing by reason of the exclusive privilege claimed by the plaintiff company. The interests of petitioners were such that they would inevitably lose by the direct legal operation and effect of the judgment which plaintiff sought to obtain in the action. We do not, of course, undertake to determine what the ultimate rights of the petitioners may be in the premises. Such matters can only be determined by making up the issues and by due trial. But the petitioners should have been permitted to file their petition and become parties, and thus secure a standing to contest the exclusive privileges asserted by the plaintiff company, and to contend for their own interests. They were entitled to show their own rights, privileges, and necessities, and <sup>see</sup> have the same considered in connection with all the facts and circumstances pertaining to the matters in litigation.

The judgment of the district court is reversed and the cause remanded.

Reversed.

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**INTERVENTION — INTEREST NECESSARY.** — The interest which entitles a party to intervene in an action between other parties must be in the matter in litigation in the suit as originally brought and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal effect of the judgment therein: *Dennis v. Spencer*, 51 Mian. 259; 33 Am. St. Rep. 499, and note. The interest in the matter in litigation, which will entitle a party to intervene in an action, must be that created by a claim to the demand, or some part thereof, or a claim to a lien on the property, or some part thereof, which is the subject of the litigation: *McClure v. State Bindery Co.*, 3 S. Dak. 362; 44 Am. St. Rep. 799. See, also, the notes to *Lacroix v. Menard*, 15 Am. Dec. 162, and *Brown v. Saul*, 16 Am. Dec. 178.

## **ANDREWS AND COMPANY v. COLORADO SAVINGS BANK.**

[20 COLORADO, 312.]

**CONDITIONAL OR ABSOLUTE SALE—HOW ASCERTAINED.**—In deciding whether an agreement under which property has been delivered by one party to another constitutes a conditional or an absolute sale with a reservation of lien to secure the payment of the purchase price the entire transaction must be considered, and its legal effect ascertained, not alone by any particular provision of such agreement, but from all its stipulations and conditions, as well as from the notes given in connection therewith.

**CONDITIONAL SALE—EVIDENCE.**—Although an agreement provides that the title to property delivered by one party to another shall remain in the vendor until full payment is made, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, such intent may be rebutted by the terms and stipulations in the notes given in pursuance of the agreement.

**CONDITIONAL OR ABSOLUTE SALE—VALIDITY.**—The optional payment of the purchase price, is as essential to constitute a transaction a conditional sale as the conditional passing of the title. A transaction in express terms imposing an unconditional liability upon the vendee to pay the purchase price, however characterized by the parties, is an absolute and not a conditional sale. If the agreement evidencing such transaction and attempting to reserve a lien on the property for the purchase price is not acknowledged and recorded as required by statute it is void as to third parties.

**ACTION** to foreclose deeds of trust and chattel mortgages. **W. L. Smith**, on June 18, 1889, was the lessee of certain lots in the city of Denver. He erected thereon a theater building and placed therein certain furniture consisting mainly of chairs and settees. On August 17, 1889, the Colorado Savings Bank loaned Smith ten thousand six hundred dollars for ninety days, taking his note, indorsed by one Bush and secured by the assignment of his lease on said lots including the building thereon, and the furniture and fixtures therein, to one Clough, as trustee. On May 29, 1889, Andrews & Co., of Chicago, Ill., as parties of the first part, entered into an agreement with Smith, representative of the Metropolitan Theater Company of Denver, party of the second part, by which the second party purchased of the first party the chairs and settees before mentioned, and agreed to pay therefor the sum of eight thousand four hundred and twenty-eight dollars and sixty cents, as follows: Two thousand one hundred and seven dollars and fifteen cents before the goods were shipped, two thousand one hundred and seven

dollars and fifteen cents sixty days after the receipt of the goods, two thousand one hundred and seven dollars and fifteen cents by note ninety days after the goods were received, and two thousand one hundred and seven dollars and fifteen cents by note one hundred and twenty days after the receipt of the goods. It was further agreed that the title to such goods, or any part thereof, should remain in the party of the first part until full payment in cash shall have been made, and that said party might at his option place such contract on record after the manner of the registry of chattel mortgages. On May 29, 1889, in pursuance of such contract, Smith executed three notes for two thousand one hundred and seven dollars and fifteen cents each to Andrews & Co., payable respectively at sixty, ninety, and one hundred and twenty days, with interest at ten per cent per annum after maturity until paid. Each of the notes recited that it was given to secure payment for the furniture furnished, and that Andrews & Co, retained title, ownership, and the right of title therein until the note and interest thereon were paid, with the right to assume possession at any time that the security was deemed insecure, and, after maturity, to sell said property, apply the proceeds above expenses to the payment of the note, and collect the balance. The Metropolitan Theater Company was duly organized as a corporation on December 30, 1889, and on that date Smith conveyed his interest in the leasehold, building, fixtures, and furniture to such corporation, subject to the lien of the Colorado Savings Bank. On December 31, 1889, the theater company entered into a contract with the Colorado Savings Bank, by which the former recognized the priority of the lien of the latter, and agreed to pay such lien in consideration that the bank would extend the time for payment, and executed its notes to the bank for the amount obtained therefrom by Smith; and, to secure the payment of such notes, executed to one Stuart, as trustee, a deed of trust on said lots, leasehold, interest, building, fixtures, furniture, etc., together with a chattel mortgage on such property, in favor of the bank. These instruments were recorded January 4, 1890. On January 1, 1890, the theater company executed and delivered to one Fisher a deed of trust on all of said property, in an amount not named, to secure the claims of Smith's creditors. On March 28, 1890, the Colorado Savings Bank commenced an action to foreclose its trust deeds and chattel mortgages on



the theater property. Andrews & Co. intervened and were made parties to this suit by stipulation. On the trial of the petition of intervention no evidence was introduced except that offered by and on behalf of Andrews & Co. It was admitted that said company was a corporation, that said Smith executed the notes and contract before mentioned, and that the furniture aforesaid was delivered to him in August, 1889, and by him placed in the theater in question. It was also made to appear by evidence that said contract and notes were duly filed for record on June 3, 1889. Judgment against the intervenors, and they bring the cause here by writ of error.

*J. H. Denison, R. E. Stevens, and H. Butler*, for the plaintiff in error.

*T. B. Stuart and Benedict & Phelps*, for the defendants in error.

218 **GODDARD, J.** The question that is first presented for our consideration, and one that we regard as decisive, is whether the arrangement under and in pursuance of which the seating was furnished by plaintiffs in error constitutes a conditional sale, or an absolute sale and transfer of ownership, with a reservation of a lien to secure the payment of the purchase price. If the latter, it must be conceded that it is in effect a chattel mortgage, and void as to third parties, because not executed and acknowledged in conformity with the chattel mortgage act.

In determining this question the entire transaction between intervenors and Smith must be considered, and its legal effect ascertained, not alone by any particular provision of the written contract itself, but from all the stipulations and agreements contained therein, as well as in the notes given in connection therewith. When so considered it is evident, notwithstanding the agreement itself provides that the title to the seating shall remain in Andrews & Co. until full payment in cash shall have been made therefor, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, that such an intention is rebutted by the terms and stipulations in the notes given in pursuance of the agreement, they being absolute obligations, making the purchaser unconditionally liable for the purchase price. The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as

the conditional passing of the title; and a transaction that in express terms imposes an unconditional liability upon the vendee to pay the purchase price for the property delivered, however characterized by the parties, is essentially and in legal effect an absolute, and not a conditional, sale.

"If, by the terms of the agreement, the purchaser becomes <sup>219</sup> liable unconditionally for the purchase price, although by the agreement he may never get the title and ownership of the property, then the agreement is an evasion of the registration statute, as its purpose is simply to retain a secret lien": *Hart v. Barney etc. Mfg. Co.*, 7 Fed. Rep. 553. In the case of *Heryford v. Davis*, 102 U. S. 235, in discussing an agreement purporting to be a lease, but similar in its terms to the one at bar in so far as it imposed an absolute liability upon the railroad company to pay for the cars, Mr. Justice Strong, in speaking for the court, says: "The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving the property as a security for the payment of a debt is the very essence of a mortgage, which has no existence in a case of conditional sale."

In terms the notes executed by Smith to the intervenors made him an absolute debtor for the price of the furniture, and the stipulation therein that "A. H. Andrews & Co., or their assigns, shall have the right to assume possession at any time they may deem themselves insecure, and after maturity to sell said property, and apply the proceeds of such sale, over and above the expenses of taking and retaining possession thereof, on this note, and to collect the balance," being manifestly for the purpose of enabling the intervenors to enforce such payment by subjecting the property to sale for that purpose, is an attempt to reserve a lien thereon to secure the payment of the purchase price.

We are therefore clearly of the opinion that the agreement and notes evidencing the transaction between the intervenors and Smith constituted an absolute sale, and that the attempt to reserve a lien on the property as security for the payment of the purchase price was void as to third parties, as being in contravention of our chattel mortgage act. It follows from this conclusion that the questions so elaborately and ably argued as to the validity of the transaction, considered as a

conditional sale, are eliminated from the case, and we are ~~are~~ relieved from the necessity of passing upon and determining what the rights of the respective parties would have been had the sale been of that character. The judgment of the court below is affirmed.

Affirmed.

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IN THE CASE OF *Jones v. Clark*, 20 Col. 353, the supreme court, Mr. Justice Goddard delivering the opinion, decided that conditional sales of personal property are valid as against those who purchase the property with notice, and creditors who become such with knowledge of the vendor's rights, and where no false credit has been induced by the ostensible ownership and possession of the vendee: Overruling *George v. Tufts*, 5 Col. 162; and affirming *Geros v. Castello*, 11 Col. 560; 7 Am. St. Rep. 260.

**CONDITIONAL SALES—WHAT CONSTITUTES.**—A conditional sale of personal property, as distinguished from an absolute sale, is one by which the right of possession in, but not the title to, chattels is made to vest in the vendee, subject to defeat or completion upon the happening or not happening of some event or condition, usually the payment of the purchase price. No particular form of words or expression is essential to such a sale. Cases involving the question as to whether a transaction is or is not a conditional sale must each be determined upon its own peculiar circumstances, and the intention of the parties in these, as well as most other transactions, is the true test, and must be collected from the condition annexed and the conduct of the parties as well as from the face of the written contract: *Hughes v. Sheaff*, 19 Iowa, 335. Whether an alleged sale is absolute or conditional is a question of fact for the jury: *Rose v. Story*, 1 Pa. St. 190; 44 Am. Dec. 121; *Vasser v. Buxton*, 86 N. C. 335.

As a general proposition it may be stated that, if by a contract the owner of personal property transfers it immediately to another with a condition in the contract that it is to be paid for by him at some future time, or in installments at specified times, and that the title to the property is to remain in the original owner until all of such purchase money has been paid, such transaction constitutes a valid contract between the parties, and, as between them, is a conditional sale, the title to the property not vesting in the vendee upon its delivery, nor until he performs the condition, or the vendor waives it: *McGinnis v. Savage*, 29 W. Va. 362; *Crocker v. Gullifer*, 44 Me. 491; 69 Am. Dec. 118; *Shoshonets v. Campbell*, 7 Utah, 46; *Campbell Printing Press Co. v. Walker*, 22 Fla. 412; *Fleury v. Tufts*, 25 Ill. App. 101; *Cooley v. Gillen*, 54 Conn. 80; *Simpson v. Shackelford*, 49 Ark. 63; *Watertown Steam Engine Co. v. Davis*, 5 Houst. 192; *Rowan v. Union Arms Co.*, 36 Vt. 124. If the language of the instrument given by the parties upon a sale and delivery of personal property plainly indicates an intent that such sale and delivery shall not divest the vendor's title until the vendee shall have performed some condition subsequent, the transaction is deemed to be a conditional sale: *Plummer v. Shirley*, 16 Ind. 380; *Bingham v. Vandegrift*, 93 Ala. 283; *Bryant v. Crosby*, 36 Me. 562; 58 Am. Dec. 767; *Haak v. Linderman*, 64 Pa. St. 499; 3 Am. Rep. 612. A sale of a negro girl, coupled with an agreement to return her to the vendor, if the purchase money is not paid by a given time, is a conditional, and not an absolute, sale: *Mount v. Harria*, 1 Smedes & M. 185; 40 Am. Dec. 99. A transaction by which the owner delivers a mare

to another to keep and work, with an agreement that the animal is to belong to the owner until the price is paid, when the owner is to give a receipt or bill of sale, is a conditional sale: *Dudley v. Abner*, 52 Ala. 572; *Dunbar v. Rawles*, 28 Ind. 225; 92 Am. Dec. 311. And a sale and delivery of a horse upon an agreement "that it should be the plaintiff's [vendor's] property until the residue of the purchase price was paid, and subject to a lien therefor," is also a conditional sale: *Vasser v. Buxton*, 86 N. C. 335. An instrument in writing in the form of a deed of bargain and sale, conveying personal property by absolute words of conveyance, but reserving to the grantor the right to redeem the property by a specified day, and stipulating on his part that in the event of his failure to redeem he would pay a certain sum for the use of the property in the mean time, has also been held to be a conditional sale: *Logwood v. Hussey*, 60 Ala. 417. A contract for the sale of a watch, by the terms of which the buyer is to take and carry it for thirty days, title in the mean time remaining in the seller, after which the sale is to be consummated by the payment of the purchase price, in installments, if the watch proves satisfactory, is not a conditional sale until the expiration of the thirty days: *Mowbray v. Cady*, 40 Iowa, 604. An instrument in writing termed a "lease," by which a purchaser acknowledges the receipt of a musical instrument, such as a piano or organ, at a certain valuation, with the right to use, and an agreement to purchase such instrument by monthly installments of a given sum, the title being retained by the vendor until the payments are made in full, and at the time agreed upon, with a right on his part to resume possession in default of payments as stipulated, former payment to be in full for rental and use of the instrument, constitutes, after the receipt of the property, neither a lease, a bailment, nor a chattel mortgage, but a conditional sale, and is valid as such: *Hine v. Roberts*, 48 Conn. 267; 40 Am. Rep. 170; *Whitcomb v. Woodworth*, 54 Vt. 544; *Dearborn v. Raynor*, 132 Pa. St. 231; *Murch v. Wright*, 46 Ill. 487; 95 Am. Dec. 455; *Meagher v. Hollenberg*, 9 Lea, 392; *Sanders v. Wilson*, 8 Mackey, 555. Any agreement by which the owner of personal property "leases" it to another, with a provision that upon the prompt payment of a sum of money named, to be paid as rental, the title to the property shall pass to the lessee, although called a lease, is neither a lease nor a chattel mortgage, but is a valid conditional sale: *Parke & Lacey Co. v. White River Lumber Co.*, 101 Cal. 37; *Gerow v. Castello*, 11 Col. 560; 7 Am. St. Rep. 260. Such a contract is a conditional sale, although it provides for the unconditional payment of the purchase price: *Kimball Co. v. Mellon*, 80 Wis. 133. These principles have often been applied to instruments in writing for the sale and purchase of sewing-machines on installments: *Singer Mfg. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 20; *Cowan v. Singer Mfg. Co.*, 92 Tenn. 376; *Singer Mfg. Co. v. Bullard*, 62 N. H. 129. And the same rules have also been applied to similar contracts under which all kinds of machinery have been delivered: *Farquhar v. McAlevy*, 142 Pa. St. 233; 24 Am. St. Rep. 497, and note 499; *Quinn v. Parke & Lacy Machinery Co.*, 5 Wash. 276; *Cherry v. Arthur*, 5 Wash. 787; *Prentiss Tool Co. v. Schürmer*, 136 N. Y. 305; 32 Am. St. Rep. 737; *Crompton v. Beach*, 62 Conn. 25; 36 Am. St. Rep. 323. If chattels are delivered by the owner to another on trial only with the right to purchase at a certain time and at a stated price in cash, if found satisfactory, the transaction is a conditional sale, and the title does not pass until payment is made or waived: *McIver v. Williams*, 83 Wis. 570; *Southern v. Cunningham*, 11 Rich. 533. An agreement by one to furnish another with goods to be

sold by the latter as the agent of the former, and to be accounted for as sales are made and prices received, is a conditional sale, and the title to the goods remains in the person furnishing them to the agent, until they are disposed of and the price is received: *Thornton v. Cook*, 97 Ala. 630. Again, if goods are sold to a retailer upon condition that the title thereto shall remain in the vendor until they are paid for, with an agreement that the vendee may dispose of them in the course of his business, and, if any are sold before full payment for the whole, the vendor can only enforce the condition against such portion as may remain unsold, the transaction is a valid conditional sale, and the title to the goods remains in the vendor until they are resold by the vendee: *Lewis v. McCabe*, 49 Conn. 141; 44 Am. Rep. 217; *Mack v. Story*, 57 Conn. 407. Or, if lumber is sold and delivered under a contract that it shall thereafter be at the risk of the vendee as to loss and damage, that he may sell, and shall account for sales, paying over all money received thereon to be applied on the purchase price, and shall thereafter pay the balance of such price, the title and right of possession of the lumber to remain in the vendor until the whole purchase price is paid, the transaction constitutes a conditional sale and not a mortgage: *Wadleigh v. Buckingham*, 80 Wis. 220. A *bona fide* sale of a freight-boat under a contract providing that the price of the boat shall be paid by the vendee out of freights derived from the boat while in his possession, is a conditional and not an absolute sale nor a mortgage, and the title to the boat remains in the vendor until the purchase price is fully paid: *Strong v. Taylor*, 2 Hill, 326. And a sale and delivery of wool at a certain price on credit, the wool to be manufactured into cloth, the title to remain in the vendor until the wool is paid for, is a conditional and not an absolute sale: *Barrett v. Prichard*, 2 Pick. 512; 13 Am. Dec. 449. An agreement by a purchaser at sheriff's sale, made after his purchase, that the original owner may repurchase the property within a given time, is also a conditional sale: *Edrington v. Harper*, 3 J. J. Marsh. 353; 20 Am. Dec. 145. So an absolute sale, with bond to recovery upon payment of a certain sum at a given day, otherwise the bond to be void, is a conditional sale, in the absence of proof of a loan of money or a forbearance: *Thompson v. Chumney*, 8 Tex. 389. If a sale and delivery of personal property is made with an agreement upon the part of the purchaser that he is to give a note or security for the purchase money, or do some other act, as a part of the transaction, which includes the sale, such sale is conditional, and the title does not pass until the thing to be done by the purchaser is done by him or waived by the vendor: *Thorpe v. Fowler*, 57 Iowa, 541; *Russell v. Minor*, 22 Wend. 659; *McRae v. Merrifield*, 48 Ark. 160; *Kimball Co. v. Mellon*, 80 Wis. 133. Thus an agreement for the sale of a horse providing that the buyer is to pay a certain sum therefor, and that, to secure the seller, the horse shall stand as his security, is a conditional sale by which the title to the horse remains in the seller until the purchase price is paid: *Clayton v. Hester*, 80 N. C. 275; and the same ruling was applied to the sale of a slave, the title to which was retained as security until the payment of the purchase price, in *Chapman v. Turner*, 1 Call, 280; 1 Am. Dec. 514. If the contract of sale provides that the property is sold for cash on delivery, or that notes for the purchase price shall be executed at that time, the sale is conditional, and the title to the property does not vest in the purchaser until the terms of sale have been complied with, although it has been delivered to the vendee: *Lang v. Rickmers*, 70 Tex. 108; *Heansville etc. R. R. Co. v. Erwin*, 84 Ind. 457; *Em-*

*pire State Type Co. v. Grant*, 114 N. Y. 40; *Russell v. Minor*, 23 Wend. 650; *Müllhiser v. Erdman*, 98 N. C. 292; 2 Am. St. Rep. 334; *Harmon v. Geetler*, 87 Ala. 325. It has been held that a sale accompanied by a delivery of the property with a stipulation that the purchase money shall be paid at a future day certain, and that on its payment the vendor is to make title to the vendee, is an absolute and not a conditional sale, although the title to the property is retained by the vendor until the purchase price is paid, as the retention of such title, if it has any effect, is only as security for the payment of the debt in the nature of a mortgage: *Weaver v. Lapeley*, 42 Ala. 601; 94 Am. Dec. 671. In *Tulbott v. Sandifer*, 27 S. C. 624, it was decided that if a sale is made partly for cash and partly to be paid for by notes maturing at different times after the delivery of the property, the legal title and right of possession thereto to remain in the vendor until the full payment of all such notes, such sale is an absolute and not a conditional sale, the cash and notes being accepted as payment, and the title thereto retained simply as security. If goods are purchased and paid for at a certain price the sale is not rendered conditional by an agreement made in the bill of sale that the seller shall receive any sum for which the goods may sell above the price paid, nor by an agreement therein that the seller shall deliver the goods at another place free of expense to the purchaser: *Jewett v. Lincoln*, 14 Me. 116; 31 Am. Dec. 36. A contract of sale, absolute in its inception and consummated by delivery of the property, is not converted into a conditional sale by an ambiguous phrase afterward indorsed upon it, even if such would have been its effect if it had formed a part of the original contract: *Carsway v. Wallace*, 2 Ala. 542.

The sale of chattels upon condition that the title is to remain in the vendor until payment of the purchase price vests no title in the purchaser until payment, and, upon his failure to pay, the vendor may recover the property from the vendee by replevin, or sue for the purchase price: *McRea v. Merrifield*, 48 Ark. 160; *Proctor v. Tilton*, 65 N. H. 3. In the absence of fraud an agreement for a conditional sale of personal property, accompanied by delivery, is good and valid, as well against creditors of and purchasers from the vendee as against the original parties to the transaction. In such case the title does not vest in the vendee until the performance of the condition by him, and prior to that time the right of the vendor to retake the property is superior to that of creditors of, or innocent purchasers from, the vendee: *Harkness v. Russell*, 118 U. S. 663; *Marvin Safe Co. v. Norton*, 48 N. J. L. 412; 57 Am. Rep. 566, and extended note, 572-585; *In re Bruford*, 3 Hughes, 295; *Lewis v. McCabe*, 49 Conn. 141; 44 Am. Rep. 217; *Mack v. Story*, 57 Conn. 407; *Little v. Page*, 44 Mo. 412; *Ridgeway v. Kenneday*, 52 Mo. 24. The distinction between conditional sales and chattel mortgages is pointed out in the notes to *Palmer v. Howard*, 1 Am. St. Rep. 63; *Hutzel v. Phillips*, 4 Am. St. Rep. 699.

## VICTOR COAL COMPANY v. MUIR.

[20 COLORADO, 228.]

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT.**—An experienced coal miner who, with knowledge that the rock in the room in the mine in which he is at work is loose, dangerous, and liable to fall at any time unless propped, and that it should be propped, voluntarily continues to work in such exposed place without propping the rock, is guilty of such contributory negligence as to bar a recovery in case the rock falls upon and injures him.

**NEGLIGENCE AS DEFENSE.**—CONTRIBUTORY NEGLIGENCE of a party injured, when clearly established by evidence substantially uncontradicted, is to be adjudged a defense as matter of law by the court.

**MASTER AND SERVANT—DEFECTIVE APPLIANCES—RISKS ASSUMED BY SERVANT.**—If injury is suffered by an employee through defects in the machinery or appliances furnished by his master and used in the business the servant cannot recover if he knew or had any means of knowledge equal to that of the master concerning such defects, and yet continued in the service, provided no inducement, such as a promise to cure the defect, leads him to so continue.

**MASTER AND SERVANT—RISKS ASSUMED BY SERVANT.**—A servant assumes all the usual and ordinary dangers incident to his employment, and is not entitled to recover damages resulting from such dangers, nor can he voluntarily and knowingly incur unusual and extraordinary dangers at the risk of his master.

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE OF SERVANT.**—Although injury occurs to a servant by reason of noncompliance on the part of the master with statutory requirements intended for the protection of the servant, the latter cannot recover if he is guilty of contributory negligence.

**MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF STATUTE.**—Although a statute requires certain things to be done by owners or agents of coal mines to secure the personal safety of persons employed therein, and provides that in case of a willful failure to comply with its provisions a right of action against the party at fault shall accrue to the party injured, yet such party cannot recover if he is guilty of willful contributory negligence as well as a violation of the provisions of such statute.

**CONTRIBUTORY NEGLIGENCE, WHEN WILLFUL.**—If a person charged with an important duty voluntarily does, or omits to do, something in respect to such duty, indicating a reckless or wanton disregard of consequences to his personal safety, he is guilty of willful contributory negligence.

**ACTION** to recover for personal injury caused by negligence. Judgment for plaintiff. Defendant appealed.

*C. Yeaman, D. C. Beaman, and Pattison & Edsall*, for the appellant.

*T. Smith and Gordon & Hendricks*, for the appellee.

329 ELLIOTT, J. The principal questions requiring consideration on this appeal are: 1. Did plaintiff's own negligence contribute to cause the injury complained of? 2. Is contributory negligence a defense in an action of this kind under the statute hereinafter cited?

1. At the time the plaintiff was injured he was employed by the defendant company mining coal in its mine. He was working with one John McDonald, a boy fifteen years of age, in the same room or working place of the mine, when a 330 rock fell from the roof of the mine, caught his right arm, and crushed it so that it had to be amputated above the elbow.

That plaintiff was negligent in knowingly and voluntarily continuing to work in such an exposed place without putting any prop under the rock which fell is manifest from his own testimony. The testimony of Superintendent Cameron makes the case still more clear. The record shows no evidence contradicting the testimony of these witnesses as to any material matter bearing upon the question of plaintiff's conduct, nor do the facts and circumstances of the case leave room for any substantial difference of opinion between intelligent and upright men that plaintiff acted negligently in thus remaining exposed to imminent danger. The case falls clearly within the rule announced in *Lord v. Pueblo Smelting etc. Co.*, 12 Col. 390.

The general rule at common law is that contributory negligence is a defense in actions of this kind, and, when clearly established by evidence substantially uncontradicted, is to be adjudged a defense as a matter of law by the court: See *Lord v. Pueblo Smelting etc. Co.*, 12 Col. 390, and decisions and authorities there cited.

Though plaintiff was only seventeen years of age when he was injured, yet he had had three years' experience in mining coal, and had worked in the room or working place where he was injured for several weeks before the injury. There is no claim that he was not as well advised and as competent to care for himself as any miner of mature age and judgment. He had observed and tested the rock—sounded it—pounded it with his pick—a half hour before it fell. He knew of the natural cracks or slips in the rock—knew it was a bad rock—knew that it was proper to put a prop under the rock—knew certainly that it ought to be propped. All this he testified to, though with seeming reluctance, upon cross-exam-



ination; and yet, because there were no props of suitable length at hand, he continued his work within a few feet of the rock until it fell. His testimony, that he did not know the rock was dangerous, or that he did not think there was any danger then, cannot be accepted in view of his knowledge of the actual condition <sup>331</sup> of the rock as testified to by himself. It is clear that he neglected a known duty, and in consequence of such neglect was injured. This was contributory negligence such as would bar his action at common law.

Plaintiff's condition is truly unfortunate; but his unfortunate condition is not of itself sufficient to make defendant liable in damages. Where the injury which a person suffers has been occasioned by his own negligence, or where his own negligence has contributed to cause such injury, the law does not, as a general rule, entitle him to relief against another party whose negligence has also in part occasioned the injury. No rule for apportioning the damages has been devised for such cases; and it is not the province of the courts, without legislative aid, to devise such a rule. There are some well-recognized exceptions, or seeming exceptions, to the general rule that contributory negligence is a defense; but the rule itself is firmly established upon the meritorious ground that it stimulates to greater diligence, and thus tends to prevent injuries to persons and property. In *Wells v. Coe*, 9 Col. 162, it is said: "Where injury is suffered by an employee through defects in the machinery or appliance furnished by his employer and used in the business, if the employee knew, or had any means of knowledge equal to that of his employer concerning such defects, yet continued in the latter's service, he cannot recover, provided no inducement, such as a promise to cure the defect, and thus remove the danger, led him to remain."

In *Colorado Midland Ry. Co. v. O'Brien*, 16 Col. 225, the following language, appropriate to the present case, was used: "Plaintiff must be held to have voluntarily assumed all the usual and ordinary dangers incident to his employment; he is not entitled to recover damages resulting from such dangers; nor could he voluntarily and knowingly incur unusual and extraordinary dangers at the risk of his master." Then follow certain exceptional rules, not appropriate in this case, because the facts and circumstances of this case are different <sup>332</sup> from *Colorado Midland Ry. Co. v. O'Brien*, 16 Col. 225,

and so do not warrant the application of such exceptional rules.

Even if it be conceded that the defendant company was negligent in not furnishing suitable props, in not properly inspecting and guarding the mine against danger to its employees, or in not being more diligent in other respects, nevertheless the record shows no evidence by which plaintiff's case can be brought within any of the usual common-law exceptions relieving him from the consequences of his own contributory negligence. It does not appear that there was any promise by the defendant company or its representative that the rock should be propped, or otherwise secured, nor even that the company or its representative had notice of the actual condition or character of the rock before it fell; nor was plaintiff commanded by defendant or its representative to continue work in the room under pain of being discharged from employment if he disobeyed. It does appear, however, without conflict in the evidence, that plaintiff, in the presence of imminent danger known, so far as appears, only to himself and his younger companion, voluntarily, without promise or command from his employer, risked all injury which might befall his life or limb from the falling of the rock, without making any effort to escape, or to protect himself, or to give notice to his employer, or to any one else, of the impending danger. We must not be understood as intimating that the condition of the rock in this case was such that an experienced miner might have risked himself under or near it, even upon the promise or command of his employer. It is not every kind of risk that may be thus excused: See *Colorado Midland Ry. Co. v. O'Brien*, 16 Col. 225; also, *District of Columbia v. McElligott*, 117 U. S. 621.

2. In behalf of plaintiff it is claimed that, even if he was guilty of negligence contributing to cause the injury, he is nevertheless entitled to recover in this action. This claim is based upon the statute concerning "Coal Mines": Sess. Laws 1885, pp. 137-141. The following are some of its provisions:

"Sec. 4. The owner or agent of every coal mine . . . shall employ a practical and competent inside overseer, to be called a 'mining boss,' who shall keep a careful watch over the ventilating apparatus and the airways, traveling-ways, pumps, timbers, and drainage; also, shall see that, as the miners advance their excavations, that all loose coal, slate, and rock overhead are carefully secured against falling

in or upon the traveling-ways, and that sufficient timber, of suitable lengths and sizes, is furnished for the places where they are to be used, and placed in the working places of the mines. . . . .

"SEC. 10. Any miners, workmen, or other person, . . . . who willfully neglects or refuses to securely prop the roof of any working place under his control . . . . shall be deemed guilty of a misdemeanor, and upon conviction may be punished by a fine of not less than twenty-five dollars, nor more than two hundred dollars, or may be imprisoned in the county jail not less than thirty days, nor more than one year, or may be punished by both such fine and imprisonment, at the discretion of the court.

"SEC. 12. For any injury to person or property occasioned by any violation of this act, or any willful failure to comply with its provisions by any owner or lessee or operator of any coal mine or opening, a right of action against the party at fault shall accrue to the party injured for the direct damages sustained thereby."

In Tennessee it is provided by statute, "in order to prevent accidents upon railroads," that certain specific regulations shall be complied with by railroad companies and their employees, among others, that "every railroad company shall keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead"; and, further, that "every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property, occasioned by, or resulting from, any accident or collision that may occur": See Code of Tennessee (Milliken & Ventrees, ed. 1884), pp. 245, 246.

The construction of this statute by the supreme court of <sup>224</sup> Tennessee is to the effect that where an accident occurs by reason of noncompliance on the part of the railroad company with the statutory requirements, the right of action in favor of the injured party is absolute, and that his contributory negligence is not a bar to the action, though it must be considered in mitigation of damages: *Nashville etc. R. R. Co. v. Smith*, 6 Heisk. 174; *Railroad v. Walker*, 11 Heisk. 388; *Nashville etc. R. R. Co. v. Nowlin*, 1 Lea, 523.

The view that contributory negligence, though not a defense, must be considered in mitigation of damages, is contrary to the general rule that "whenever it (contributory

negligence) is a defense at all it is a complete defense to the action": Beach on Contributory Negligence, sec. 69. The Tennessee rule may have produced substantial justice as applied to the facts of the particular cases above cited. But is the rule safe for all kinds of cases? May a person voluntarily station himself upon a railroad track over which he knows trains are liable to pass at any time, and then hold the railroad company responsible in damages, however small, on the ground that the company had neglected some of the requirements of the statute? If so, a person may voluntarily bring an injury upon himself, and then hold another responsible in damages therefor.

Counsel cite numerous cases arising under statutes requiring railroad companies to fence their right of way, and making them liable for injuries to livestock occasioned by their neglect or failure to fence: *Cressey v. Northern R. R. Co.*, 95 N. H. 564; 47 Am. Rep. 227; *Flint etc. Ry. Co. v. Lull*, 28 Mich. 510; *Congdon v. Central Vt. R. R. Co.*, 56 Vt. 390; 48 Am. Rep. 793; *Corwin v. New York etc. R. R. Co.*, 13 N. Y. 42. Some of these cases hold that, where an owner of domestic animals allows them to graze upon his own land adjacent to a railroad not fenced as required by statute, he is not prevented from recovering damages for the killing of such animals by passing trains, even though he had notice that the road was not fenced when he turned out his stock to graze. This view is unobjectionable. A rule that would <sup>335</sup> hold the owner of livestock guilty of contributory negligence under such circumstances would defeat the obvious purpose of the statute. It would enable a railroad company to rely upon its own neglect of duty as a defense against injuries arising from such neglect; and the more manifest the neglect the more certain the defense, because the more likely the owner would be to have notice of the neglect. Thus the railroad company's own negligence would become its own protection. Contributory negligence, to constitute a defense, must have a different foundation. Merely allowing livestock to graze under such circumstances is not contributory negligence. As was said by Mr. Justice Stanley in *Cressey v. Northern R. R. Co.*, 59 N. H. 564, 47 Am. Rep. 227: "If the liability of the defendants (the railroad company) depends on the exercise of ordinary care by the plaintiff the defendants need never fence their road, so far as respects adjoining owners. The plaintiff could not enjoy the full benefit of his land. He could only make such use of

it as would not require it to be inclosed. His use of it would depend on the pleasure of the defendants. It is not contributory negligence, within the meaning of the rule, for the owner to pasture his stock upon his own land because the railroad fails to discharge its statutory duty and fence its road. Whether the defendants would be liable if the plaintiff willfully drove his mare upon the railroad, or drove her and left her in an exposed situation, we need not consider, since the facts stated do not raise such a question."

The case of *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, is much relied on to sustain the view that contributory negligence is not a defense in actions of this kind. In one count of the declaration it is averred that the coal company willfully used uncovered cages to hoist and lower into its mine persons employed to work therein, and that Taylor was injured in consequence of being carried in an uncovered cage. Upon this phase of the case the supreme court of Illinois said:

"The sixth section of the act required appellant to provide a safe means of hoisting and lowering persons at the mines, with a sufficient cover overhead on every box or carriage <sup>336</sup> used for hoisting purposes, for the protection of persons hoisted or lowered into the mines. The 14th section declares: 'For any injury to person or property occasioned by any willful violations of this act or willful failure to comply with any of its provisions a right of action shall accrue to the party injured for any direct damages sustained thereby.'

"Where an action is brought to recover for an injury resulting from the negligence of another, which was not wanton or willful, it is an essential element to a recovery that the plaintiff or party injured must have exercised ordinary care to avoid the injury; but, as we understand the authorities, where the injury has been willfully inflicted an action may be maintained, although the plaintiff or party injured may not have been free from negligence."

Notwithstanding the view thus expressed, yet the court, in the same opinion, said that the question whether Taylor was in the exercise of due care was submitted to the jury with an instruction that they should find for the defendant "if they believed from the evidence the said Taylor did not exercise due care, and that his death would not have happened but for his own negligence"; and the court further expressed the opinion that the evidence did not "justify the theory

that the misconduct of the deceased materially contributed to the injury."

The case of *Durant v. Lexington Coal Min. Co.*, 97 Mo. 62, is also relied on by counsel for plaintiff. The Missouri statute required, among other things, that "the owner, agent, or operator of every coal mine operated by shaft shall provide suitable means of signaling between the bottom and the top thereof; and shall also provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." Section 8 provides: "The top of each and every shaft, and the entrance to each and every intermediate working vein, shall be securely fenced by gates properly covering and protecting such shaft and entrance thereto." Section 337 14 enacts: "For any injury to persons or property, occasioned by any willful violation of the act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby."

Upon the question of contributory negligence the court observed:

"The next contention of the appellant is that knowledge on the part of the plaintiff that the cage was not covered with iron, and that no contrivance had been provided for signaling from top to bottom of the shaft, and that the top of the shaft had no gates or other protection, should defeat the action. Such a declaration of law would in effect nullify the statute. Knowledge only by the plaintiff of the failure of defendant to have the mine provided with these protections will not defeat the action. It must be remembered that the plaintiff, to prevail, must show a willful violation or failure to comply with the statutory regulations. Our statute seems to be the same as that of Illinois, and it has been held there that, though the injured person may not have been entirely free from fault, still if the jury found that the willful conduct of the defendant resulted in an injury, the verdict would be justified: *Litchfield Coal Co. v. Taylor*, 81 Ill. 590. But we do not say in this case that plaintiff could recover if guilty of negligence himself.

"There is evidence in this case that plaintiff was out of his place when in the cage, and that he should have pushed the pit-car into the cage. On the other hand there is evidence that he had directions from the pit boss to pull the car

in, and that he had been provided with hooks to do the work as he did, and that he was not negligent. Whether he was guilty of negligence contributing to the injury was submitted to the jury on various instructions favorable to defendant."

It will be observed that neither the Illinois case nor the Missouri case, *supra*, fully sustains the contention of plaintiff that contributory negligence can never be a defense under the statute.

§ 32 The question involved in this case is one of great magnitude. Considering the hundreds and thousands of persons employed in the various coal mines of the state it is important that all classes of miners and mine-owners shall understand the nature of the liability imposed by the statute, and particularly that they shall know whether contributory negligence may or may not, under any circumstances, constitute a defense to an action based upon the statute.

The statute requires certain things to be done by the owners or agents of coal mines, and provides in case of a willful failure to comply with its provisions that a right of action against the party at fault shall accrue to the party injured, etc. Undoubtedly, such willful failure constitutes negligence *per se*; and, when such negligence causes injury to another, a cause of action *prima facie* accrues to the injured party. But there is no express provision of the statute to the effect that contributory negligence shall never constitute a defense to such action. The right of action is given against the party at fault. But suppose the injured party is also at fault. The statute in terms gives the right of action in favor of the injured party and against the party whose fault alone occasions the injury, not against the party whose fault would not have occasioned the injury but for the fault of the plaintiff himself. Nothing is said about a right of action accruing to the party injured in case the injury is caused by his own failure to comply with the statute, as well as by the failure of some other party. Unless there be some thing in the language of the statute or in its manifest object and purpose requiring a different construction in order to make it effective the statute should be construed according to common-law principles; that is contributory negligence should be held a defense in proper cases, unless the statute, by its terms or manifest purpose, forbids such a construction.

Counsel claim that the statute should be favorably con-

strued in behalf of plaintiff, since it was passed in obedience to the following provision of the constitution:

"The general assembly shall provide by law for the proper <sup>339</sup> ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein; and shall prohibit the employment in the mines of children under twelve years of age": Const., art. 16, sec. 2.

We are unable to see how this provision particularly affects the construction to be given to the statute, except as it shows constitutional direction for its passage. The statute, like other statutes, is to be so construed as to best promote its objects

Considering the various sections of the statute it is clear that its primary object—its manifest purpose—was to secure the health and personal safety of all persons engaged in underground coal mining. Its primary object was not to create new rights of action in favor of miners against their employers. The granting of additional rights of action was intended to insure the enforcement of the statutory regulations for the protection of the health and safety of those engaged in such mining pursuits. This is as apparent from section 10 as from section 12. Section 4 makes it the duty of the "mining boss," among other things, to see that sufficient timber of suitable lengths and sizes is placed in the working places of the mine; but, by section 10, the duty of securely propping the roof of a mine by actually setting such timbers thereunder is devolved upon any miner or workman, as well as upon the mining boss or other person having the control of any working place in the mine, and the willful neglect of such duty is made a misdemeanor punishable by fine or imprisonment, or both.

3. When plaintiff found that he could not securely prop the roof of the working place under his control, and yet thereafter continued to expose himself to imminent danger from the falling of the rock, he was not only guilty of contributory negligence as held at common law, but he was guilty of violating section 10 of the statute in not taking steps to obtain suitable timber for propping the mine, or in not giving immediate notice to his employer or its representative <sup>340</sup> of the condition of the roof, so that suitable timber might be furnished for propping the same. It is true there was evidence tending to show that there were no props about the



premises of the defendant company, but there was also much evidence to the contrary; so that the question whether the defendant company was or was not guilty of willful neglect, in the sense contemplated by the statute, is not free from doubt under the evidence. But it is clear that plaintiff knowingly and voluntarily neglected his duty in the very matter which brought about his injury. His contributory negligence may therefore be said to have been willful. To hold that such contributory negligence is not a defense certainly would not tend to promote the observance of the various requirements of the statute. On the contrary, such a holding would tend to decrease diligence on the part of employees, since it would enable them to carelessly and willfully expose their lives and limbs at the risk of their employers. This would tend to defeat, rather than to promote, the primary object and purpose of the statute. The construction of a statute which tends to defeat its object is certainly to be avoided.

Law writers have classified negligence by such distinguishing names as "slight," "ordinary," and "gross"; to these the courts have added the term "willful." Since negligence means inadvertence or carelessness, words implying an absence of thought, care, or intention, it has been said that the term "willful negligence" is a misnomer; nevertheless, the term has come to have a well-settled signification in the law. When a person charged with an important duty voluntarily does or omits some thing in respect to such duty, indicating a reckless or wanton disregard of consequences to the rights or personal safety of another, his conduct is characterized as willful negligence. Negligence and contributory negligence are of the same intrinsic nature (*Denver etc. R. R. Co. v. Ryan*, 17 Col. 102); hence we have spoken of plaintiff's contributory negligence in this case as willful, since his conduct indicated <sup>241</sup> a reckless disregard of consequences to his own life or limb.

4. Greater diligence should not be exacted of miners than common prudence requires them to exercise, considering the circumstances under which their work is carried on. In some cases the dangerous condition of the roof of a mine may not be obvious without critical inspection. The defect may be latent, and not actually known to the miner, even though the mining boss might discover the same by keeping the careful watch, and taking the precautions to keep the roof from

falling, which the statute imposes upon him as a special duty. In case of accident and injury to the miner under such circumstances he might not be held guilty of such contributory negligence as would prevent his recovery. The negligence in such case might be attributable to the mining boss, or, perhaps, to the company itself. But, where a miner knowingly and voluntarily exposes himself to the falling of a defective roof, which he has inspected, and found to be so defective that a miner of common prudence should deem it unsafe, his negligence is to be held willful, and sufficient to preclude his recovery for an injury brought upon himself for such exposure.

Our conclusion is that the trial court should have granted a nonsuit, or directed a verdict for defendant upon the evidence. This court has adopted a liberal rule for the determination of questions of negligence and contributory negligence, as an examination of its decisions will show. Such questions are generally questions of fact for the jury; but when, under the rule, the evidence presents a clear question of law, the court should decide the same as such, and not abdicate its functions to the jury.

The judgment of the district court is reversed and the cause remanded.

Reversed.

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**CONTRIBUTORY NEGLIGENCE AS A DEFENSE.**—Although a person or corporation may be guilty of a negligent act from which injury results to another, yet if the party injured has, by his own negligence, contributed to his receiving the injury he cannot recover damages from the other: *Florida etc. Ry. Co. v. Hirst*, 30 Fla. 1; 32 Am. St. Rep. 17, and note. Contributory negligence, when a proximate cause of injury, bars the right of recovery: *Cline v. Crescent City R. R. Co.*, 43 La. Ann. 327; 26 Am. St. Rep. 187, and note. See the extended notes to *Johnson v. Hudson River R. R. Co.*, 75 Am. Dec. 383, and *Freer v. Cameron*, 55 Am. Dec. 667-677.

**MASTER AND SERVANT—ASSUMPTION OF RISKS—GENERAL RULE.**—A servant, upon entering an employment, assumes only such risks as are within or naturally incident thereto: *Michael v. Roanoke Machine Works*, 90 Va. 492; 44 Am. St. Rep. 927, and note, with the cases collected.

**MASTER AND SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF SERVANT.**—If a servant, knowing of a defect in machinery, materials, or premises furnished for his use, without complaint or promise from the master to repair, continues to use them, he assumes the risk, and waives all claims against the master for injury therefrom: *Breckinridge Co. v. Hicks*, 94 Ky. 362; 42 Am. St. Rep. 361, and note.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**MT. CARMEL v. SHAW.**

[155 ILLINOIS, 37.]

**MUNICIPAL CORPORATIONS—EQUITABLE CONTROL OVER.**—Where municipal authorities are acting within their well-recognized power, or are exercising a discretionary authority, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the prejudice of a citizen.

**STREETS, VACATING PORTION OF.**—A city having power to vacate streets has power to vacate any part of any street.

**STREETS.—ON VACATING PART OF A STREET THE TITLE VESTS** in the owners of the abutting lots, where the original right to the street was acquired by dedication. Therefore, an ordinance vacating part of a street, and declaring that the part vacated is donated and given to the abutting lots, states only a conclusion of law.

**STREETS.—SHADE TREES IN THE PUBLIC STREETS OF A CITY ARE THE PROPERTY OF THE MUNICIPALITY,** and it has complete control over them, and may, therefore, destroy them, when necessary, in the progress of constructing a sidewalk.

SUIT to obtain an injunction against the destruction of certain shade trees situate in a public street of the city of Mt. Carmel. The complainants were the owners of a lot in front of which, in the public street, were two large maple trees planted in the year 1857. When planted they were beyond the sidewalks as then existing. Subsequently the municipality, by an ordinance, vacated a portion of the street, and by another ordinance directed the construction of a sidewalk, which, because of its commencing outside of the part vacated, extended so far into the street that it was necessary either to destroy the trees in question or to build the sidewalk around them. The municipal authorities having decided on the former plan, this suit was brought to prevent its execution.

*George P. Ramsey and M. F. Hoskinson, for the appellant.*  
*Mundy & Organ, for the appellees.*

40 BAKER, J. By the general incorporation act, under which the city of Mt. Carmel is organized, it has power to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve its streets and sidewalks, and vacate the same. It may do any thing with its streets which is not incompatible with the end for which streets are established: *Roberts v. City of Chicago*, 28 Ill. 249; *Murphy v. City of Chicago*, 29 Ill. 279; 81 Am. Dec. 807. And where the municipal authorities are acting within their well-recognized powers, or are exercising a discretionary power, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the oppression of the citizen: *Brush v. City of Carbondale*, 78 Ill. 74.

The rights of the parties to this controversy seem to depend largely upon the question whether the city, under its power to vacate streets, has power to vacate only a portion of a street. Under the familiar rule that the whole of a thing includes all of its parts it would seem that it has. In *Village of Hyde Park v. Dunham*, 85 Ill. 569, this court, speaking of the village there a party, said: "The corporate authorities are vested with complete control, as is every other municipal corporation, over its streets. They may contract or widen them whenever, in their opinion, the public good shall so require. Property owners purchase and hold subject to these powers, and they have no vested right to deny the widening, contracting, or <sup>41</sup> otherwise improving any street." From the decisions in *City of Chicago v. Union Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598, and *People v. Village of Hyde Park*, 117 Ill. 462, there is a plain implication that a municipal corporation may vacate a part of a street, as distinguished from the vacation of an entire street. In *Mayer v. Village of Teutopolis*, 131 Ill. 552, an ordinance of the village vacating a certain portion of a street in that village was held valid. In *Smith v. McDowell*, 148 Ill. 51, the ordinance was not held invalid on the ground that only a portion of the street was vacated. It was a part of the particular case that the ordinance assumed to vacate, not the whole, but a portion, only, of the street there involved, but the gist of the decision was that the corporate authorities had no power to so vacate for the sole benefit and use of a private person. The vacation

of an entire street, under like circumstances, would be alike *ultra vires*. The rule there laid down would be applicable to the case of the whole of a street as well as to that of a portion of it. We said: "The municipal corporation holding and controlling its streets in trust for the use of the general public, without power of converting them to any other use, it follows, necessarily, that the right to 'vacate the same' is to be exercised only when the municipal authorities, in the exercise of their discretion, determine the street is no longer required for the public use or convenience." No reason is perceived why a city council might not, under some circumstances and in the exercise of a sound official discretion, conclude that a portion of a street, either in length or in width, was not necessary for public use and convenience, and that public interests would be subserved by vacating the same, and thus freeing the municipality from the duty and burden of keeping it in good and safe condition and repair.

This case is wholly different from *Smith v. McDowell*, 148 Ill. 51. It conclusively appears upon the face of the ordinance, as well as from the other evidence in the record, <sup>as</sup> that the vacation of parts of the public streets was for entirely legitimate purposes, and in furtherance of what the city council, in the exercise of the discretion vested in them by the statute, deemed a wise and salutary public policy. The streets were all ninety-nine feet wide, and it was evidently concluded that so great a width of street was not required for public use and convenience, except in respect to Market street—the business street of the city,—and so the ordinance was passed, and the cost of paving and maintaining a useless width of public highway lifted from the shoulders of the municipality and its taxpayers.

It is claimed that section four of the ordinance is void; that the city authorities had no power to sell, donate, or give away parts of the public streets that they held in trust. It is ordained in the ordinance "that a strip two feet wide next to the property, lands, lot, or lots abutting on said streets shall be and is hereby vacated." It is admitted that the original plat of the city and streets was signed by the attorney in fact of the proprietors of the land, and that this makes it a common-law dedication of the streets: *Gosselin v. City of Chicago*, 103 Ill. 628; *Earll v. City of Chicago*, 186 Ill. 277; *Thomsen v. McCormick*, 186 Ill. 135. It therefore resulted, when the strips two feet wide were vacated by the city, that

they became parts of the lots adjoining them, and the lot lines were extended two feet; and it also resulted that by operation of law the titles of the owners of the abutting lots to the portions of the strips located in front of their respective lots became absolute, and freed from the encumbrance of the easements that had been upon them. It follows that the concluding words of the section, to the effect that the strip taken from the streets was donated and given to the lot or lots, were but mere surplusage.

The ordinance of 1891 was and is valid, and when the city council, by the ordinance of July 25, 1892, made provision for the construction of a brick sidewalk six feet <sup>43</sup> in width on the north side of Sixth street, and that it should be made and constructed along the outside line of said street, and adjoining the lot or lots abutting on said street, the line so fixed by the ordinance applied to and was coincident with the lot line and street line as fixed by the prior ordinance of 1891.

Shade trees in the public streets of a city are the property of the municipality, and it has complete control over them: *Baker v. Town of Normal*, 81 Ill. 108. There was nothing unlawful in the conduct of the city officials. The council had authority to order a brick sidewalk six feet wide to be built along the line of the street, and adjoining the lot of appellees. It is to be presumed that there was a public necessity for its construction. At all events, that was a matter that the statute submitted to their discretion. The two large trees were in the line of the sidewalk ordered, and the larger part of their bodies was within the limits upon which the sidewalk was located by the ordinance. The sidewalk could not be constructed in conformity with the ordinance without cutting them down and removing them. If left standing they would be permanent obstructions. We do not think that the proposed action in the premises of the city officials can justly be regarded as wanton, or as so unreasonable and oppressive as to give a court of chancery jurisdiction to interfere: *Brush v. City of Carbondale*, 78 Ill. 74. In fact, it seems to us it would be more unreasonable to destroy the symmetry and impair the convenience and safety of the sidewalk, by either leaving obstructions in it that are two feet in diameter, or by turning it out, on the south side of the trees six or seven feet into the roadway of the street, or by contracting it, on the north side of the trees, to the width of four

feet, than it would be to cut down the trees that do not belong to appellees, but afford shade to their premises.

In our opinion both the decree of the circuit court and that decree as modified by the appellate court are erroneous <sup>41</sup> as is also the judgment of affirmance. The judgment and the decrees are reversed, and the cause is remanded to the circuit court, with directions to dissolve the injunction and dismiss the bill of complaint for want of equity, at the cost of the complainants therein.

Reversed and remanded. —

**STREETS—VACATING—RIGHTS OF THE PARTIES—DAMAGES.**—This question is discussed at length in the note to *Heinrich v. St. Louis*, post, p. 000.

**MUNICIPAL CORPORATIONS—SHADE TREES IN STREETS—DESTRUCTION OF.** Shade trees standing in a public street near the line of the sidewalk may be cut down and removed by the municipal officers in pursuance of the authority which the city possesses over its streets and sidewalks: *Chase v. City of Oshkosh*, 81 Wis. 313; 29 Am. St. Rep. 398, and note. See, also, the note to *Callanan v. Gilman*, 1 Am. St. Rep. 843.

**MUNICIPAL CORPORATIONS—JUDICIAL CONTROL OVER POWERS OF.**—The discretion of municipal corporations within the sphere of their powers is not subject to judicial control, except in cases where fraud is shown, or where the power or discretion is being grossly abused to the oppression of the citizen: *Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214, and note.

## RITCHIE v. PEOPLE.

[155 ILLINOIS, 32.]

**CONSTITUTIONAL LAW.—LIMITATION UPON RIGHT TO CONTRACT.**—A statute declaring that no person shall be employed more than a specified number of hours in each day or week is a restriction upon the right to contract for employment.

**CONSTITUTIONAL LAW.—RESTRICTION UPON RIGHT OF FEMALES TO CONTRACT FOR LABOR.**—A statute declaring that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, is an attempted infringement upon the constitutional rights of the employer and the employee, and must therefore be adjudged void under a constitutional provision to the effect that no person shall be deprived of life, liberty, or property without due process of law.

**CONSTITUTIONAL LAW.—LIBERTY INCLUDES THE RIGHT TO ACQUIRE PROPERTY,** and that means and includes the right to make and enforce contracts.

**CONSTITUTIONAL LAW.—RIGHT TO CONTRACT.**—The legislature has no power to prevent persons who are *aut juris* from making their own contracts, nor can it interfere with the freedom to contract between workmen and employers.

**CONSTITUTIONAL LAW.—ONE IS DEPRIVED OF PROPERTY WITHIN THE MEANING OF THE CONSTITUTION** if he is deprived of the right to make reasonable contracts.

**CONSTITUTIONAL LAW—PERSONAL PRIVILEGES.**—The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions.

**CONSTITUTIONAL LAW—SPECIAL PROHIBITIONS.**—A law purporting to deprive one class of manufacturers of the right to employ females for more than a specified number of hours per day, while it leaves manufacturers of other classes free from any prohibitions on this subject, there being no reason why the prohibitions should apply to one class rather than to another, is void because it is an arbitrary, unreasonable discrimination.

**CONSTITUTIONAL LAW—THE RIGHT TO MAKE CONTRACTS IS INHERENT AND INALIENABLE.**—Any attempt to unreasonably abridge it is opposed to the constitution.

**CONSTITUTIONAL LAW—POLICE POWER, LIMITATION UPON.**—Statutes passed in pursuance of the police power must have some relation to the end sought to be accomplished. Where the ostensible object is to secure the public comfort, welfare, and safety the statute must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of a mere police regulation when such is not the effect.

**CONSTITUTIONAL LAW.—A WOMAN IS ENTITLED** to the same rights under the constitution to make contracts with reference to her labor as are secured thereby to men. She is both a citizen and a person within the meaning of the fourteenth amendment of the constitution of the United States. With respect to an occupation not unsuitable to her sex the legislature cannot declare the number of hours per day or week in which she may be employed.

**CONSTITUTIONAL LAW.—IF A STATUTE INCLUDES TWO DISTINCT SUBJECTS,** both expressed in the title, the whole act must be treated as void.

**CONSTITUTIONAL LAW.—THOUGH A CONSTITUTION PROVIDE THAT BILLS MAKING APPROPRIATIONS** for the pay of members and officers of the general assembly and for salaries of officers of the government shall contain no provision on any other subject, a statute may be enacted regulating the manufacture of clothing, wearing apparel, and other articles, and making an appropriation to pay the expenses and salaries of the officers required to perform the special duties required by such statute.

**CONSTITUTIONAL LAW, SUBJECT OF A STATUTE NOT EMBRACED IN ITS TITLE.** A statute entitled, "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same and to make appropriations therefor," and which, after enacting general provisions upon the subject of the manufacture of clothing, appropriates a sum of money for the payment of the salaries of inspectors created by the act, contains a subject not expressed in the title and must therefore be disregarded as void under a constitution declaring that, "No act hereafter passed shall embrace more than one subject and that shall be embraced in the title, but, if any subject shall be embraced in the act which shall not be embraced in the title, such act shall be void only as to so much thereof as shall be so expressed."



**CONSTITUTIONAL LAW.**—THOUGH A PART OF A STATUTE IS UNCONSTITUTIONAL the remainder will not be declared to be unconstitutional also, if the two are distinct and separable, so that the latter may stand though the former becomes of no effect.

*Moran, Kraus & Meyer*, for the plaintiff in error.

*Maurice T. Moloney, attorney general, T. J. Scofield, M. L. Newell, John W. Ela, and Andrew Alex Bruce*, for the people.

<sup>101</sup> **MAGRUDER, J.** Upon complaint of the factory inspector appointed under the law hereinafter named, a warrant was issued by a justice of the peace of Cook county against plaintiff in error, and, upon his appearance and waiver in writing of jury trial, a trial was had resulting in a finding of guilty, and the imposition of a fine of five dollars, and costs. The complaint charged that, on a certain day in February, 1894, plaintiff in error employed a certain adult female of the age of more than eighteen years to work in a factory for more than eight hours during said day. The plaintiff in error took an appeal to the criminal court of Cook county, and waived a jury, and, upon trial in that court before the judge without a jury, he was convicted and fined. The case is brought to this court by writ of error for the purpose of reviewing such judgment of the criminal court.

<sup>102</sup> Upon the trial of the cause the defendant below submitted written propositions to be held as law in the decision of the case. By these propositions the trial court was asked to hold, that the act of the legislature of Illinois, entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same, and to make an appropriation therefor," approved June 17, 1893 (Laws, 1893, p. 99), and each and every section thereof, is illegal and void, and contrary to and in violation of the constitutions of Illinois and of the United States. The court refused all of the propositions so submitted, and exception was taken by the defendant.

The present prosecution, as is conceded by counsel on both sides, is for an alleged violation of section 5 of said act. That section is as follows: "No female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week."

"Factory" or "workshop" is defined in section 7 of the act as follows: "The words, 'manufacturing establishment,' 'fac-

tory,' or 'workshop,' wherever used in this act, shall be construed to mean any place where goods or products are manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages."

Punishment for violation of the provisions of the act is provided for by section 8 thereof in the following words: "Any person, firm, or corporation, who fails to comply with any provision of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than three dollars nor more than one hundred dollars for each offense."

The main objection urged against the act, and that to which the discussion of counsel on both sides is chiefly directed, relates to the validity of section 5. It is contended by counsel for plaintiff in error, that that section <sup>103</sup> is unconstitutional as imposing unwarranted restrictions upon the right to contract. On the other hand, it is claimed by counsel for the people, that the act is a sanitary provision and justifiable as an exercise of the police power of the state.

Does the provision in question restrict the right to contract? The words, "no female shall be employed," import action on the part of two persons. There must be a person who does the act of employing and a person who consents to the act of being employed. Webster defines employment as not only "the act of employing," but "also the state of being employed." The prohibition of the statute is, therefore, twofold, first, that no manufacturer, or proprietor of a factory or workshop, shall employ any female therein more than eight hours in one day; and, second, that no female shall consent to be so employed. It thus prohibits employer and employee from uniting their minds, or agreeing upon any longer service during one day than eight hours. In other words, they are prohibited, the one from contracting to employ, and the other from contracting to be employed, otherwise than as directed. "To be 'employed' in any thing means not only the act of doing it but also to be engaged to do it; to be under contract or orders to do it": *United States v. Morris*, 14 Pet. 464. Hence, a direction, that a person shall not be employed more than a specified number of hours in one day, is at the same time a direction, that such person shall not be under contract to work for more than a specified number of hours in one day. It follows, that section 5 does limit and restrict

the right of the manufacturer and his employee to contract with each other in reference to the hours of labor.

Is the restriction thus imposed an infringement upon the constitutional rights of the manufacturer and the employee? Section 2 of article 2 of the constitution of Illinois provides that "no person shall be deprived of life, liberty, or property, without due process of law." <sup>104</sup> A number of cases have arisen within recent years in which the courts have had occasion to consider this provision, or one similar to it, and its meaning has been quite clearly defined. The privilege of contracting is both a liberty and property right: *Fraser v. People*, 141 Ill. 171. Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts: *State v. Loomis*, 115 Mo. 307. The right to use, buy, and sell property and contract in respect thereto is protected by the constitution. Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty above quoted: *State v. Goodwill*, 33 W. Va. 179; 25 Am. St. Rep. 863; *Godcharles v. Wigeman*, 118 Pa. St. 431; *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206. The protection of property is one of the objects for which free governments are instituted among men: Const. art. 2, sec. 1. The right to acquire, possess, and protect property includes the right to make reasonable contracts: *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533. And when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution: *Matter of Application of Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636. The fundamental rights of Englishmen, brought to this country by its original settlers and wrested from time to time in the progress of history from the sovereigns of the English nation, have been reduced by Blackstone to three principal or primary articles: "The right of personal security, the right of personal liberty, and the right of private property": 1 Blackstone's Commentaries <sup>105</sup>

marg. p. 129. The right to contract is the only way by which a person can rightfully acquire property by his own labor. "Of all the 'rights of persons' it is the most essential to human happiness": *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407; 41 Am. St. Rep. 109.

This right to contract, which is thus included in the fundamental rights of liberty and property, cannot be taken away "without due process of law." The words "due process of law" have been held to be synonymous with the words "law of the land": *State v. Loomis*, 115 Mo. 307; *Frorer v. People*, 141 Ill. 171. Blackstone says: "The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land": 1 Blackstone's Commentaries, 138; *Ex parte Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636. The "law of the land" is "general public law binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals or classes of individuals": *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869. The "law of the land" is the opposite of "arbitrary, unequal, and partial legislation": *State v. Loomis*, 115 Mo. 307. The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it is deprived of liberty in particulars of primary importance to his pursuit of happiness. If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right. In line with these principles it has been held that it is not competent, under the constitution, for the legislature to single out owners and employers of a particular class, and provide that they shall bear burdens not imposed on <sup>100</sup> other owners of property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make: *Millett v. People*, 117 Ill. 294; 57 Am. Rep. 869; *Frorer v. People*, 141 Ill. 171; *Ramsey v. People*, 142 Ill. 380.

We are not unmindful that the right to contract may be subject to limitations growing out of the duties which the

individual owes to society, to the public, or to the government. These limitations are sometimes imposed by the obligation to so use one's own as not to injure another by the character of property as affected with a public interest or devoted to a public use, by the demands of public policy or the necessity of protecting the public from fraud or injury, by the want of capacity, by the needs of the necessitous borrower as against the demands of the extortionate lender. But the power of the legislature to thus limit the right to contract must rest upon some reasonable basis, and cannot be arbitrarily exercised. It has been said that such power is based in every case on some condition, and not on the absolute right to control. Where legislative enactments, which operate upon classes of individuals only, have been held to be valid it has been where the classification was reasonable, and not arbitrary: *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407; 41 Am. St. Rep. 109; *State v. Loomis*, 115 Mo. 37.

Applying these principles to the consideration of section 5 we are led irresistibly to the conclusion that it is an unconstitutional and void enactment. While some of the language of the act is broad enough to embrace within its terms the manufacture of all kinds of goods or products, other provisions are limited to the manufacture of "coats, vests, trousers, kneepants, overalls, cloaks, shirts, ladies' waists, purses, feathers, artificial flowers, or cigars, or any wearing apparel of any kind whatsoever." The act is entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles," etc. Under the rule of construction heretofore<sup>107</sup> laid down by this court, that general and specific words, which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general, it would seem that the general words, "and other articles," should be restricted to a meaning analogous to the meaning of the words "clothing, wearing apparel," and, consequently, that they would only embrace articles of the same kind as those expressly enumerated: *First Nat. Bank v. Adam*, 138 Ill. 483; *Misch v. Russell*, 136 Ill. 22. But whether this is so or not, we are inclined to regard the act as one which is partial and discriminating in its character. If it be construed as applying only to manufacturers of clothing, wearing apparel, and articles of a similar nature, we can see no reasonable ground for prohibiting such manufacturers and

their employees from contracting for more than eight hours of work in one day, while other manufacturers and their employees are not forbidden to so contract. If the act be construed as applying to manufacturers of all kinds of products, there is no good reason why the prohibition should be directed against manufacturers and their employees, and not against merchants, or builders, or contractors, or carriers, or farmers, or persons engaged in other branches of industry, and their employees therein. Women employed by manufacturers are forbidden by section 5 to make contracts to labor longer than eight hours in a day, while women employed as saleswomen in stores, or as domestic servants, or as book-keepers, or stenographers, or typewriters, or in laundries, or other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. The manner in which the section thus discriminates against one class of employers and employees and in favor of all others places it in opposition to the constitutional guaranties hereinbefore discussed, and so renders it invalid.

100 But, aside from its partial and discriminating character, this enactment is a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties. It substitutes the judgment of the legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employee, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. When the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the constitution, even though it imposes the same burden upon all other citizens or classes of citizens. General laws may be as tyrannical as partial laws. A distinguished writer upon constitutional limitations has said, that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights, and that, while every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient

principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation: Cooley on Constitutional Limitations, 5th ed., top p. 434, marg. p. 355; *Bank of Columbia v. Okely*, 4 Wheat. 235. Section 1 of article 2 of the constitution of Illinois provides as follows: "All men are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." Liberty, as has already been stated, includes the right <sup>100</sup> to make contracts, as well with reference to the amount and duration of labor to be performed, as concerning any other lawful matter. Hence, the right to make contracts is an inherent and inalienable one, and any attempt to unreasonably abridge it is opposed to the constitution. As was aptly said in *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407, 41 Am. St. Rep. 109: "Where the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract, or controlling the terms thereof."

An instance of the care with which this right to contract has been guarded may be found in chapter 48 of the Revised Statutes of this state, where an act, passed in 1867, makes eight hours of labor in certain employments a legal day's work, "where there is no special contract or agreement to the contrary"; and the second section of which act contains the following provision: "Nor shall any person be prevented by any thing herein contained from working as many hours overtime or extra hours as he or she may agree."

In *Ex parte Kuback*, 85 Cal. 274, 20 Am. St. Rep. 226, an ordinance of the city of Los Angeles, making it a misdemeanor for any contractor to employ any person to work more than eight hours a day where the work was to be performed under any contract with the city, was held to be unconstitutional and void, the supreme court of California there saying: "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business

and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, <sup>110</sup> as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation; but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered, because the contract is that he shall work more than a limited number of hours per day." In the case of *Low v. Rees Printing Co.*, 41 Neb. 127, 43 Am. St. Rep. 670, an act of the legislature of that state, providing that eight hours shall constitute a legal day's work for all classes of mechanics, servants, and laborers throughout the state, excepting those engaged in farm and domestic labor, and making violation of the provision a misdemeanor, was held to be unconstitutional and void, both as being special legislation, and as attempting to prevent persons, legally competent to enter into contracts, from making their own contracts.

But it is claimed on behalf of defendant in error, that this section can be sustained as an exercise of the police power of the state. The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety it must appear to be adapted to that end; it cannot invade the rights of person and property under the guise of a mere police regulation, when it is not such in fact; and, where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society: <sup>111</sup> *Lake View v. Roschill Cem. Co.*, 70 Ill. 191; 22 Am. Rep. 71; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Gilson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

There is nothing in the title of the act of 1893 to indicate,



that it is a sanitary measure. The first three sections contain provisions for keeping workshops in a cleanly state and for inspection to ascertain whether they are so kept. But there is nothing in the nature of the employment contemplated by the act which is in itself unhealthy, or unlawful, or injurious to the public morals or welfare. Laws restraining the sale and use of opium and intoxicating liquor have been sustained as valid under the police power: *Ah Lim v. Territory*, 1 Wash. 156; *Mugler v. Kansas*, 123 U. S. 623. Undoubtedly, the public health, welfare, and safety may be endangered by the general use of opium and intoxicating drinks. But it cannot be said that the same consequences are likely to flow from the manufacture of clothing, wearing apparel, and other similar articles. "The manufacture of cloth is an important industry, essential to the welfare of the community": *Commonwealth v. Perry*, 155 Mass. 117; 31 Am. St. Rep. 533. We are not aware that the preparation and manufacture of tobacco into cigars is dangerous to the public health; *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636.

It is not the nature of the things done but the sex of the persons doing them which is made the basis of the claim that the act is a measure for the promotion of the public health. It is sought to sustain the act as an exercise of the police power upon the alleged ground, that it is designed to protect woman on account of her sex and physique. It will not be denied, that woman is entitled to the same rights, under the constitution, to make contracts with reference to her labor as are secured thereby to men. The first section of the fourteenth amendment to the constitution of the United States provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of <sup>112</sup> life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law." It has been held that a woman is both a "citizen" and a "person" within the meaning of this section: *Minor v. Happersett*, 21 Wall. 162. The privileges and immunities here referred to are, in general, "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole": *Slaughterhouse cases*, 16 Wall. 36. As a citizen, woman has

the right to acquire and possess property of every kind. As a "person," she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty, or property without due process of law. Involved in these rights thus guaranteed to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions, or other vocations. Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex: *In re Leach*, 134 Ind. 665.

The tendency of legislation in this state has been to recognize the rights of woman in the particulars here specified. The act of 1867, as above quoted, by the use of the words, "he or she," plainly declares that no woman shall be prevented by any thing therein contained from working as many hours overtime or extra hours as she may agree; and thereby recognizes her right to contract for more than eight hours of work in one day. An act approved March 22, 1872, entitled "An act to secure freedom in the selection of an occupation," etc., provides that "no person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex": 1 Starr & Curtis' Annotated Statutes, 1056. <sup>113</sup> The Married Woman's Act of 1874 authorizes a married woman to sue and be sued without joining her husband, and provides that contracts may be made and liabilities incurred by her and enforced against her to the same extent and in the same manner as if she were unmarried, and that she may receive, use, and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors: Ill. Rev. Stats., ch. 68, secs. 1, 6, 7.

Section 5 of the act of 1893 is broad enough to include married women and adult single women as well as minors. As a general thing it is the province of the legislature to determine what regulations are necessary to protect the public health and secure the public safety and welfare. But inasmuch as sex is no bar, under the constitution and the law, to the endowment of woman with the fundamental and inalienable rights of liberty and property which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights,

unless the courts are able to see that there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare proposed to be secured by it: *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465.

Counsel for the people refer to statements in the text-books, recognizing the propriety of regulations which forbid women to engage in certain kinds of work altogether. Thus, it is said in Cooley on Constitutional Limitations, that "some employments . . . may be admissible for males and improper for females, and regulations, recognizing the impropriety and forbidding women engaging in them, would be open to no reasonable objection": 5th ed. 745. Attention is also called to the above-mentioned act of March 22, 1872, which makes an exception of military service, and provides that nothing in the act shall be construed as requiring any female to <sup>114</sup> work on streets, or roads, or serve on juries. But, without stopping to comment upon measures of this character, it is sufficient to say that what is said in reference to them has no application to the act of 1893. That act is not based upon the theory that the manufacture of clothing, wearing apparel, and other articles is an improper occupation for women to be engaged in. It does not inhibit their employment in factories or workshops. On the contrary, it recognizes such places as proper for them to work in by permitting their labor therein during eight hours of each day. The question here is not whether a particular employment is a proper one for the use of female labor, but the question is whether, in an employment which is conceded to be lawful in itself and suitable for women to engage in, she shall be deprived of the right to determine for herself how many hours she can and may work during each day. There is no reasonable ground—at least none which has been made manifest to us in the arguments of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow. But the police power of the state can only be permitted to limit or abridge such a fundamental right as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare, or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling. The court of appeals of New York, in passing upon the validity of an act "to im-

prove the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses," etc., has said: "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manipulation may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public <sup>115</sup> health": *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636. Tiedeman, in his work on Limitations of Police Power, says: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. . . . There can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the State to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened": Sec. 86.

We are also referred to statements made in some of the text-books to the effect that the legislature may limit the hours of labor of women in manufacturing establishments: Parker & Worthington's Public Health and Safety, sec. 260; 18 Am. & Eng. Ency. of Law, 753. These statements appear to be based entirely upon the decision of the supreme court of Massachusetts in *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383. There it was held that an act, providing that no woman over the age of eighteen years should be employed by any person, firm, or corporation in any manufacturing establishment more than ten hours in any one day, was valid. But, under the constitution of Massachusetts (art. 4, sec. 1), the legislature has power to ordain all manner of wholesome and reasonable statutes, with or without penalties, not repugnant to the constitution, "as they shall judge to be for the good and welfare of the commonwealth, and for the governing and ordering thereof, and of the subjects of the same." The decision referred to was evidently made in view of the large discretion so <sup>116</sup> vested in the legislative branch of the government; and it was said that the act might be main-

tained as a health or police regulation, because the legislature deemed the employment of manufacturing dangerous to health. But the Massachusetts case is not in line with the current of authority, as it assumes that the police power is practically without limitation. As has already been stated, the legislature cannot so use that power as to invade the fundamental rights of the citizen, and it is for the courts to decide whether a measure, which assumes to have been passed in the interest of the public health, really "relates to and is convenient and appropriate to promote the public health": *In re Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636; *People v. Gillson*, 109 N. Y. 389; 4 Am. St. Rep. 465. We said in *Lake View v. Roseshill Cem. Co.*, 70 Ill. 191, 22 Am. Rep. 71: "As a general proposition it may be stated it is the province of the lawmaking power to determine when the exigency exists calling into exercise this power. What are the subjects of its exercise is clearly a judicial question." The reasoning of the opinion in the Massachusetts case cited does not seem to us to be sound. It assumes that there is no infringement upon the employer's right to contract, because he may employ as many persons or as much labor as he chooses, nor upon the employee's right to contract, because she may labor as many hours as she chooses in some other occupation than that specified in the statute. This is a begging of the question. The right to contract would be valueless, if it could not be exercised with reference to the particular subject matter in hand. If its exercise is forbidden between two persons competent to contract and concerning a lawful subject of contract it is none the less abridged because other persons may be permitted to contract, or because the same persons may be at liberty to contract about some other matter.

We cannot more appropriately close the discussion of this branch of the case than by quoting and adopting as our own the following words of the New York court of <sup>117</sup> appeals in *In re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636: "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law (section), and we must, therefore, pronounce it unconstitutional and void.

In reaching this conclusion we have not been unmindful that the power which courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance. But as said by Chancellor Kent (1 Kent's Commentaries, 450), 'It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights.'

It is furthermore contended by plaintiff in error that the act of 1893 is void upon the alleged ground that it contains two distinct subjects, and that both of these are expressed in the title. The two constitutional provisions which are invoked in favor of this position are sections 13 and 16 of article 4. Section 13 is as follows: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But, if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed." Section 16 is as follows: "The general assembly shall make no appropriation of money out of the treasury in any private law. Bills making appropriations for the pay of members and officers of the general assembly, and for the salaries of the officers of the government, shall contain no provision on any other subject."

<sup>118</sup> The two subjects, alleged to be contained in the act and expressed in its title, are: 1. The general subject of regulating the manufacture of clothing, wearing apparel, and other articles, including the requirements as to cleanliness, inspection, employment of minors, keeping of registers of names, ages, residences, etc., appointment of inspectors, fixing their salaries, duties, terms of office, etc; and 2. The appropriation of money for the payment of the salaries of the inspectors. Section 9 of the act provides that "the governor shall, upon the taking effect of this act, appoint a factory inspector, at a salary of \$1,500 per annum, an assistant factory inspector, at a salary of \$1,000 per annum, and ten deputy factory inspectors, of whom five shall be women, at a salary of \$750 per annum each. The term of office of the factory inspector shall be four years, and the assistant factory inspector and the deputy factory inspectors shall hold office during good behavior. Said inspector, assistant inspector, and deputy inspectors shall be empowered to visit and in-

spect, at all reasonable hours, and as often as practicable, the workshops, factories, and manufacturing establishments in this state where the manufacture of goods is carried on, and the inspectors shall report, in writing, to the governor, on the fifteenth day of December, annually, the result of their inspections and investigation, together with such other information and recommendations as they may deem proper; and said inspectors shall make a special investigation into alleged abuses in any of such workshops whenever the governor shall so direct, and report the result of the same to the governor. It shall also be the duty of said inspector to enforce the provisions of this act, and to prosecute all violations of the same before any magistrate or any court of competent jurisdiction in the state." Section 10 provides "that the following named sums, or so much thereof as may be necessary, respectively, for the purposes hereinafter named, be and are hereby appropriated: 1. <sup>119</sup> \$20,000 for the salaries of inspector, assistant inspector, and the ten deputy factory inspectors, as hereinbefore provided; 2. The sum of \$8,000 to defray traveling expenses and other necessary expenses incurred by said inspector, assistant factory inspector, or deputy inspectors while engaged in the performance of their duties, not to exceed \$4,000 in any one year."

The general rule is that, where an act includes two distinct subjects and both are expressed in the title, the whole act must be treated as void under such a provision as section 13, because it is impossible to choose between the two subjects, and hold the act valid as to one and void as to the other: Cooley on Constitutional Limitations, 5th ed., top p. 178; Sutherland on Statutory Construction, sec. 103. We are inclined to think that the body of the act does embrace two subjects. The factory inspectors, provided for in the act, must be regarded as state officers, or officers of the government.

Section 24 of article 5 of the constitution declares, that "an office is a public position, created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed." The duties of the inspectors are continuing, and are prescribed by statute, and not by contract, and some portion of the functions of government are committed to their charge. They seem to come within the definition of "officers," as given in the constitution, and as laid down in the decisions

of this court: *Bunn v. People*, 45 Ill. 397; *Wilcox v. People*, 90 Ill. 186; *People v. Morgan*, 90 Ill. 558.

The manifest intention of section 16 was to make the subject of appropriations for the pay of the members and officers of the legislature, and for the salaries of the officers of the government, a separate and distinct subject for legislative action. In a bill making appropriations for those objects every provision is unconstitutional which proposes to do any thing besides making such appropriations: <sup>120</sup> Appropriation Bill, 14 Fla. 284. If the act of 1893 was strictly a general appropriation bill to pay the legislature and for the salaries of the officers of the government every thing else in it would be void. But it is not such a bill. Certainly its title does not indicate that it is such a bill. Its body contains a provision appropriating money for the payment of the factory inspector and his or her deputy and assistants. This provision is merely subordinate and subsidiary to the main purpose of regulating the manufacture of clothing, wearing-apparel, and other articles.

In order to make the act void under the constitutional prohibition contained in section 13 the two subjects must not only be contained in the body of the act but must also be expressed in its title. We do not think that we would be justified in holding that two subjects or objects are expressed in the title to this act of 1893. Courts always give a liberal and not a hypercritical interpretation to this restriction. All matters are properly included in the act which are germane to the title. The constitution is obeyed, if all the provisions relate to the one subject indicated in the title, and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the bill shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. Where there is doubt as to whether the subject is clearly expressed in the title the doubt should be resolved in favor of the validity of the act. An act to incorporate a city may contain provisions for the raising of revenue for its government. An act "concerning drainage" may include assessments upon lands benefited to pay the expense: *Sutherland on Statutory Construction*, secs. 82, 85, 86, 88, 92-96; *Johnson v. People*, 88 Ill. 431.

Here, the main subject or purpose expressed in the title is



the regulation of the manufacture of the articles <sup>131</sup> therein named. The appointment of inspectors for the enforcement of such regulation, and the making of "an appropriation therefor," are germane to the main subject, and a part of it. They merely amplify the subject, and are incidental and auxiliary to the object contemplated by it. The title of the act not only does not mention the pay of the legislature and the salaries of the government officers, but it does not mention the salaries of the inspectors. The word, "therefor," does not necessarily imply that the appropriation is for the salaries of the inspectors. *Non constat*, so far as the title expresses to the contrary, that the inspectors were not to act without salaries. The title can well be interpreted as referring to the expenses of enforcing the regulation provided for, such as traveling expenses, the expenses attendant upon gathering information, and making investigations, and reporting to the governor, and prosecuting violations of the act by employing counsel, or otherwise. It does not follow, that "a specific provision for the payment of expenses, necessary, proper, incidental, or growing out of a law itself, or which may be deemed needful in carrying it or its subject into execution, would not be valid, because such a provision, being matter properly connected with the subject of the law as expressed in the title, would not be prohibited by the title": Revenue Law, 14 Fla. 287.

If it were not for section 16 it might be said that the salaries of the inspectors were a necessary expense incidental to the execution of the law, and properly included in the title, though not expressly named therein. But sections 13 and 16 are in the same article of the constitution, and both use the word "subject," which evidently has the same meaning in each. The question, therefore, whether the matter of the salaries of state officers is an independent subject is not a matter of construction, because the constitution itself, by the language used in section 16, defines and sets apart appropriations for such salaries as a subject, which is distinct and separate from <sup>132</sup> all others, and cannot be included in any other. The design of that section was to enable the people to see clearly what and how much compensation their servants are receiving, without being confused by a commingling of outside matters with appropriations therefor.

We are inclined to think, that the second clause of section 10 of the act appropriating "twenty thousand dollars for

the salaries of inspector, assistant inspector, and ten deputy factory inspectors, as hereinbefore provided," is a subject embraced in the act, which is not expressed in the title, and must therefore be regarded as void under the provision in the second sentence of section 13. It is true, that the clause only makes an appropriation for the salaries of one class of state officers, and is not a general appropriation for the pay of the legislature and for the salaries of all the officers of the government. But it was the intention of section 16 that the salary of each of such officers, as well as of all of them collectively, should be provided for by appropriations in a separate bill, standing by itself and apart from any provision on any other subject. The mandate of the constitution, as embodied in that section, cannot be violated by passing separate bills making separate and distinct appropriations for the salaries of particular officers of the government, or of particular classes of government officers, and embodying in such separate bills provisions on other subjects than the appropriations so made.

Our conclusion is, that section 5 of the act of 1893, and the first clause of section 10 thereof, are void and unconstitutional for the reasons here stated. These are the only portions of the act which have been attacked in the argument of counsel. No reason has been pointed out why they are not distinct and separable from the balance of the act. The rule is that, where a part of a statute is unconstitutional, the remainder will not be declared to be unconstitutional also, if the two are distinct and separable so that the latter may stand, though <sup>123</sup> the former becomes of no effect: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278. We do not wish to be understood by any thing herein said as holding that section five (5) would be invalid if it was limited in its terms to females who are minors.

The judgment of the criminal court of Cook county is reversed and the cause is remanded to that court, with directions to dismiss the prosecution.

Reversed and remanded. \_\_\_\_\_

**STATUTES—CONSTITUTIONALITY OF LIMITING RIGHT TO CONTRACT.**—If any person is denied the right to contract or to acquire property in the manner which he has hitherto enjoyed and which others are still allowed by law to enjoy he is deprived of both the constitutional right of liberty and property to the extent that he is thus denied the right to contract. So a law singling out persons or corporations engaged in any particular business

and depriving them of the right to contract as persons or corporations engaged in other businesses may lawfully do is unconstitutional: *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206, and note; *Low v. Rees Printing Co.*, 41 Neb. 127; 43 Am. St. Rep. 670, also see the extended note to *State v. Goodwill*, 25 Am. St. Rep. 881.

CONSTITUTIONAL LIBERTY MEANS not only freedom of the citizen from servitude or restraint, but includes the right of every man to be free in the use of his powers and faculties and to adopt and pursue such avocations as he may choose, subject only to the restraints necessary to secure the common welfare: *Braceville Coal Co. v. People*, 147 Ill. 66; 37 Am. St. Rep. 206.

CONSTITUTIONAL LAW.—CLASS LEGISLATION is such as denies rights to one which are accorded to others or inflicts upon one a more severe penalty than is imposed upon another in a like case offending: *People v. Bellet*, 99 Mich. 151; 41 Am. St. Rep. 589, and note. See the discussion of the constitutionality of such laws found in the extended notes to *State v. Goodwill*, 25 Am. St. Rep. 871, and *State v. Ellet*, 21 Am. St. Rep. 781.

POLICE POWER—PROPER EXERCISE OF.—An act to be justified as an exercise of the police power of a state must tend in a degree that is perceptible and clear toward the preservation of the lives, the health, the morals and the welfare of the community: *Health Department v. Rector*, 145 N. Y. 32; 45 Am. St. Rep. 579, and note. See, also, the note to *People v. Wagner*, 24 Am. St. Rep. 145.

STATUTES—TITLE EMBRACING MORE THAN ONE SUBJECT: See the extended notes to *Davis v. State*, 61 Am. Dec. 337, and *Neuendorff v. Duryea*, 25 Am. Rep. 245, and the note to *State v. Nomland*, 44 Am. St. Rep. 576.

STATUTES—SUBJECT EXPRESSED IN TITLE.—The title to a statute must clearly express the subject or subjects contained therein, otherwise the statute is unconstitutional and void: *Philadelphia v. Ridge Ave. Ry. Co.*, 142 Pa. St. 484; 24 Am. St. Rep. 512, and note; *State v. Nomland*, 3 N. Dak. 427; 44 Am. St. Rep. 572, and note.

STATUTES VOID IN PART.—If a statute attempts to accomplish two or more objects and is void as to one it may still be in every respect complete and valid as to the other: *Chicago etc. R. R. Co. v. Jones*, 149 Ill. 361; 41 Am. St. Rep. 278, and note.

## FIREMEN'S INSURANCE Co. v. THOMPSON.

[186 ILLINOIS, 204.]

CORPORATIONS, FOREIGN, JURISDICTION OVER.—A corporation receiving an application to insure property situate in another state and issuing a policy thereon must be deemed to subject itself to the jurisdiction of the courts of that state and to the right of the insured to bring an action upon the policy in the state wherein his property is situate, and to serve process on the insurer in the manner prescribed by the laws of that state. Therefore if a statute of that state defines who shall be regarded as agents of an insurer and that process may be served upon any of such agents, a judgment based upon the service of such process on such an agent, valid in the state where rendered, is equally valid in a state wherein the insuring corporation has its principal place of business and of which it is a resident.

**JUDGMENT OF SISTER STATE, EFFECT OF.**—A judgment entered against an insurance corporation is entitled to have the credit, effect, and value in this state which it has in the state where rendered. Whatever pleas are good to a suit on the judgment in that state can be pleaded in the courts of this state and no others.

*William J. Ammen*, for the appellant.

*H. B. Jackson, M. H. Eaton, and H. I. Weed*, for the appellee.

<sup>205</sup> **PHILLIPS, J.** Appellant, a fire insurance company incorporated under the laws of this state, with its principal office and place of business at Chicago, issued a policy of insurance against loss by fire to appellee, on a shingle-mill owned by him and located in the city of Oshkosh, Wisconsin. A loss occurred, and appellee brought suit on his policy in the circuit court of Winnebago county, in that state, and recovered a judgment for four hundred and eighty-six dollars and seventy-four cents and costs of suit. On April 16, 1892, appellee filed his declaration in the circuit court of Cook county, setting up said judgment and the failure and refusal of defendant to pay the same, to his damage in the sum of six hundred dollars, and recovered a judgment <sup>206</sup> against appellant for five hundred and twenty dollars and seventy-four cents debt and thirty-three dollars and thirty-nine cents damages, together with costs. On appeal to the appellate court this judgment was affirmed, and that court having granted the necessary certificate of importance, the insurance company prosecutes this further appeal.

It is conceded that the sole question presented upon this record for our consideration is in respect of the jurisdiction of the circuit court of Wisconsin over the appellant corporation to render the judgment sued on. It appears that there was a firm of insurance agents doing business in Oshkosh, Wisconsin (A. L. Tuttle & Co.), who received from appellee an application for insurance; that they sent the application to a firm of insurance agents, or brokers, in the city of Chicago, who took the application and applied to appellant for a policy, which was issued on said application and delivered to the Chicago agents, and they sent it to the Oshkosh agents, who delivered it to appellee. It also appears that appellee, upon receipt of the policy, paid the premium to the Oshkosh agents, who sent it to the Chicago agents, who, in turn, paid it to appellant; that appellant knew no agent in the trans-

action except the Chicago firm, who knew only the Oshkosh agent; that the property was described in the application and policy as belonging to appellee, and located on "block A, second ward, Oshkosh, Wisconsin." The Wisconsin judgment was obtained on service of summons in the mode prescribed by the statute of that state, by delivering a copy of the summons to A. L. Tuttle, one of the Oshkosh firm of agents, and by informing him of its contents, and it appears from the record in that case that he personally transmitted the application, received the premium, and delivered to appellee the policy.

The statute in force in Wisconsin, declaring who shall be deemed an agent for an insurance company, prescribes: "Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance, <sup>307</sup> or a policy of insurance, to or from any such corporation, or who makes any contract of insurance, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertising to do any such thing, shall be held an agent for such corporation to all intents and purposes, and the word 'agent,' whenever used in this chapter, shall be construed to include all such persons."

The supreme court of that state has held that this statute applies to foreign or nonresident insurance corporations doing business in that state, and that service of summons may be had upon any person who does for such corporation any of the acts specified in said section, whether such person receives compensation therefor or not: *State v. Northwestern Endowment etc. Assn.*, 62 Wis. 174. And that it applies to agents of foreign companies or corporations doing business in that state, whether licensed or unlicensed, and that by voluntarily doing business in the state the companies submit themselves to such laws as the legislature may deem proper to enact — and in support of the holding very many cases in the courts of other states are quoted from and collated: *State v. United States Mutual Accident Assn.*, 67 Wis. 624.

No question is raised as to the due authentication of the judgment, or that the circuit court of Wisconsin is not a superior court of record of general jurisdiction, nor is any question made that the service was not in all respects in due conformity to the mode prescribed by the statute of that state. The contention, therefore, that the court of Wisconsin

sin did not have jurisdiction, is predicated solely upon the ground that appellant was a corporation organized and existing under and by virtue of the laws of the state of Illinois, and had no agent in Oshkosh representing it in the transaction, and that having made and delivered, wholly in Illinois, the contract insuring said property in Wisconsin, appellant ought not, <sup>see</sup> by that act alone, be held to subject itself to the laws of that state, and to the annoyance and expense of a suit against it. It would seem to be a sufficient answer to this contention that appellant was apprised by the application, and expressly admitted by the description in its policy, that the risk which it assumed to carry was fixed property in Oshkosh, Wisconsin, and, if it desired to confine its contracts of insurance to the operation of the laws of this state, it ought not receive premiums from and issue policies to citizens of other states. It would be most inequitable and unjust, if not productive of the grossest hardship and fraud, to allow insurance companies which are organized under the laws of this state and have their principal office and place of business here, to receive premiums and make contracts of insurance with citizens of other states upon property in those states, and, when a loss occurs, shield themselves from liability behind their Illinois charters. As said by the distinguished judge of the appellate court: "The appellant had notice, by the application, that the risk was on fixed property in Wisconsin. If it chose to accept the risk, it did so upon the terms which that state had prescribed. . . . Before the policy issued, was the time for the appellant to consider the liability it would incur under Wisconsin law, and the probability that it might provide a more ready remedy for a loss under the policy than to follow the insurance company to another state and there present in detail the evidence of such loss."

We are not prepared to say that the circuit court of Wisconsin erred in finding the jurisdictional facts as it did. Certainly, sufficient in the transaction came to the knowledge of appellant to put it upon inquiry in respect of location of the risk and of the assured. By taking a risk within the state of Wisconsin it voluntarily submitted itself to the laws of that state. If the recitals in the record of that court are to be taken, as they must, <sup>see</sup> since their truthfulness is not questioned, as true, they afford conclusive evidence of the facts essential to jurisdiction (*Van Matre v. Sankey*, 148 Ill.

536-554; 39 Am. St. Rep. 196), and if the decisions of the court of last resort of that state are to be, as they must, regarded as binding upon us in respect of the construction to be placed upon the statute above quoted, it necessarily follows that the judgment will, unless attacked for fraud, be held valid and conclusive upon the parties and privies until reversed or set aside in the jurisdiction where rendered. Under such circumstances we are required to give the proceeding in that court full faith and credit. Jurisdiction of the person of the appellant was obtained by due service upon a party declared by statute to be its agent for that purpose, and the court found that such party performed the acts named in the statute which were necessary to constitute him such agent, and no attempt was made by appellant to have this judgment set aside or reversed in the courts of that state. The court found, specifically, the facts necessary, under the statute, to give it jurisdiction of appellant upon the service had, and that it had jurisdiction of the subject matter if of the person of appellant, as we have seen it had, is not questioned. This being so, it is manifest that the judgment is entitled to have the same credit, validity, and effect in this state which it has in the state where rendered. Whatever pleas would be good to a suit on the judgment in that state, and no others, can be pleaded in the courts of this state: *Lawrence v. Jarvis*, 32 Ill. 304, and cases cited; *Hampton v. McConnel*, 3 Wheat. 234. These principles, it would seem, are conclusive against appellant, and further discussion is unnecessary.

All the elements essential to give the circuit court of Wisconsin jurisdiction to render the judgment being found, it follows that the judgment of the appellate court was correct, and will be affirmed.

Judgment affirmed.

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**CORPORATIONS—FOREIGN—JURISDICTION OVER.**—A corporation doing business in a foreign state thereby subjects itself to the statutes of that state: *Rothrock v. Dwelling House Ins. Co.*, 161 Mass. 423; 42 Am. St. Rep. 418, and note; but see *American Water Works Co. v. Farmers' Loan etc. Co.*, 20 Col. 203, ante, p. 283, and note.

**JUDGMENTS OF SISTER STATES—EFFECT OF.**—Under the constitution of the United States the judgment of a sister state must be accorded in this state the same faith and credit which it has in the state where rendered: *Orumlish v. Central Imp. Co.*, 38 W. Va. 390; 45 Am. St. Rep. 868, and note.

## DURKEE v. PEOPLE.

[155 ILLINOIS, 354.]

**CORPORATIONS—BY-LAWS INCONSISTENT WITH THE GENERAL LAW.**—A corporation has no power to change or abrogate any provision of the law of its existence by means of a by-law.

**CORPORATIONS.—A BY-LAW OF A CORPORATION AUTHORIZING HOLDERS OF BONDS ISSUED BY IT TO VOTE** at its elections is void if the general laws of the state confer that authority on stockholders only.

**CORPORATIONS.—A CONTRACT STIPULATING THAT THE HOLDERS OF THE BONDS OF A CORPORATION MAY VOTE** at its elections must be disregarded if the constitution or laws of the state give such right to stockholders only.

**CORPORATIONS.—THE POWER TO RATIFY AN AGREEMENT OR BY-LAW** cannot extend to agreements or by-laws which a corporation has no power to make. Nor can the stockholders by their acquiescence or agreement ratify such action of the corporation so that they may not at any time refuse further acquiescence, and insist on their rights under the law.

**ESTOPPEL.—A CONTRACT VOID AS AGAINST A STATUTE** cannot become valid and operative through an estoppel.

**CORPORATIONS—NOTICE MUST BE TAKEN BY ALL PERSONS OF THE LIMITATIONS** upon the power of a corporation contained in the laws of the state. Therefore, no one can be regarded as deceived into the supposition that a corporation can make a contract into which it has sought to enter, if the power to make it is denied by law.

QUO WARRANTO to test the right of the appellant Durkee to hold the office of director of the Toledo, Peoria & Western Railway Company, which had been organized under the general laws of the state, with a capital stock of four million five hundred thousand dollars. Moran and Denny, before such organization, had the railway already constructed, and they subscribed for forty-four thousand nine hundred and ninety-one shares of its capital stock under an agreement that they would convey the railroad to the corporation in payment of their subscription, and that they should in addition receive four thousand five hundred bonds of the value of one thousand dollars each. Immediately after receiving and accepting this subscription the directors, incorporators, and other stockholders made and adopted by-laws for the corporation, providing that the holders of bonds should have the same right to vote at corporate meetings as the holders of stock. Afterward, pursuant to a vote of the corporation, the stock and bonds were issued, the latter containing a statement on their face that the holders were entitled to vote, and the former that it was subject to the equal right of the bondholders to vote at corporate elections. At an election held



in 1893 the appellant was elected director if the bondholders were entitled to vote, otherwise he was defeated for such office by the relator. In an opinion delivered in the appellate court it was said:

"The railway company had power to make by-laws not inconsistent with its charter or the purpose of its creation, nor repugnant to the common law, and was expressly authorized by its charter to establish by-laws for the management of its affairs according to law. It had no power, however, to change or abrogate any provision of the law of its existence by means of a by-law, and, if the by-law empowering bondholders to vote at stockholders' meetings is in conflict with the law under which the corporation is organized, it is necessarily void.

"In the statute under which this company was organized the following provisions are found.

" 'Sec. 8. All the corporate powers of every such corporation shall be vested in and be exercised by a board of directors, who shall be stockholders of the corporation, and shall be elected at the annual meetings of the stockholders at the public office of the corporation within this state.' . . .

" 'Sec. 25. In all elections for directors and managers of such railway corporations every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors, multiplied by the number of his shares of stock, shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.'

"Said section 25 was enacted in pursuance of section 3, article 11, of the constitution, which contains the same provision and prohibition concerning the election of directors by stockholders as section 25 of the statute.

"By these provisions the power to elect directors of the corporation was conferred upon the stockholders, and the exercise of the power was regulated. It may be conceded that the primary object of adopting the constitutional provision, and the like provision in the statute, was to protect minorities in bodies of stockholders; but that fact would not change or affect its force, for such object would be defeated

by subjecting the right of stockholders to interference by the votes of bondholders unregulated by law. The by-laws in question would give the bondholders control of the corporation instead of the stockholders, for there was but four million five hundred thousand dollars of stock and five million dollars of bonds. The amount of bonds delivered to Moran and Denny equaled the whole capital stock, and the exercise of the privilege of voting on the bonds so delivered to them would double the voting power authorized by law. No by-law could extend or restrict that power as fixed and regulated by the constitution and the charter. The by-law in question being in conflict with the constitution and statute, and against the policy of the state, and proposing an alteration of the charter and continued violation of the law, was void: *State of Nevada v. Curtis*, 9 Nev. 325; *People v. Fire Department*, 31 Mich. 458.

"The provision made by the corporation, and contained in the bonds and mortgage, that the holders of bonds might vote at any and every meeting of stockholders, is subject to the same objections as the by-laws. Being in violation of express statutory and constitutional provisions, the agreement was inoperative and void: *Penn v. Bornman*, 102 Ill. 523; 2 Parsons on Contracts, 5th ed., 673.

"Nor has such agreement become binding by subsequent ratification, acquiescence, or estoppel. Whether bondholders have ever exercised the supposed right to participate in the management of the affairs of the corporation does not appear; but assuming that such is the fact, and that they have been permitted to do so without objection, the agreement would not thereby become operative. A contract which the corporation could not make, it could not ratify or make valid by any subsequent act. If there was no power to make it there would be equally a lack of power to confirm it: *Board of Commrs. v. L. M. & B. R. R. Co.*, 50 Ind. 85.

"In the transaction Moran and Denny subscribed for forty-four thousand nine hundred and ninety-one shares of stock, which constituted the entire capital stock except nine shares, and the holders of those nine shares assented to the arrangement. All the stock, therefore, came either through Moran and Denny, or through the holders of the remaining nine shares, all of whom participated in the transaction. The condition that bondholders might vote was printed in the certificates, so that all holders had notice of the provi-

sion. But neither notice of nor assent to an illegal transaction, nor acquiescence merely on the part of a stockholder in acts in execution of such transaction, will prevent him from withholding further assent, and preventing further execution of it, unless an estoppel can be invoked under some recognized rule of law. The mere fact of participation on the part of the corporation or stockholders in an agreement in violation of the charter could not produce that result, which would be, in effect, abrogating the charter: *Penn v. Bornman*, 102 Ill. 523.

"There is no question of fraud or bad faith in this case. No one was deceived or misled as to any fact. It is to be observed that the right of bondholders to vote at stockholders' meetings was not made a condition in the proposition of Moran and Denny to the corporation. It was not a condition imposed by them, but appears to have been rather a matter of grace or favor to them. But if it were to be regarded as a condition of the contract of sale, its illegality arose from the fact that it was a violation of the statutes of the state, and a contract void as against a statute cannot become operative and valid through an estoppel. There is no estoppel against showing that a contract is invalid, as in violation of a statute or against public policy: *Brightman v. Hicks*, 108 Mass. 246; *Langan v. Sankey*, 55 Iowa, 52; *Tibble v. Anderson*, 63 Ga. 41.

"Corporations possess such powers, and such only, as are conferred upon them by the law of their creation. This corporation was organized under a general and public law of the state, which defined the lawful limits of its capacity. The parties who dealt with it are chargeable with notice of its powers and the limitations of its capacity, and cannot plead ignorance of the public laws and the constitution. No one could be deceived into the supposition that the corporation could lawfully make such a contract as the one in question, for the want of power to make it would be apparent from the public law. In such a case every person is bound, in dealing with a corporation, to take notice of the extent of its powers: *Pearce v. M. & I. R. R. Co.*, 21 How. 441; *McGregor v. Official Manager*, 16 Eng. L. & Eq. 180; *New Orleans etc. S. S. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; 26 Am. Rep. 90; *Franklin County v. Lewiston Inst. for Savings*, 68 Me. 43; 28 Am. Rep. 9; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258; 41 Am. Rep. 221; *Hackensack Water Co.*

v. *De Kay*, 86 N. J. Eq. 548; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; 3 Am. Rep. 322.

"The cases cited by counsel for appellant in support of the proposition that a corporation is estopped from asserting that a contract is *ultra vires* where it has received a benefit under the contract, are cases where the making of such a contract was within the scope of the corporate franchise, and the contracts were sought to be avoided because there was a failure to comply with some regulation, or the power was improperly exercised. In *Davis v. Old Colony R. R. Co.*, 131 Mass. 258, 41 Am. Rep. 221, it is said: 'There is a clear distinction, as was pointed out by Mr. Justice Campbell in *Zabriskie v. Cleveland etc. R. R. Co.*, by Mr. Justice Hoar in *Monument Bank v. Globe Works*, and by Lord Chancellor Cairns and Lord Hatherley in *Ashbury Ry. etc. Co. v. Riche*, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general power, or the failure to comply with prescribed formalities or regulations in a peculiar instance, when such abuse or failure is not known to the other contracting parties.'

"No doubt a person dealing with a corporation, who finds the making of a contract to be within the scope of the corporate powers under the charter, has a right to assume that its officers, in the management of its affairs, have complied with all the conditions necessary to the exercise of the power. If the contract with the corporation can be valid under any circumstances, an innocent person has a right to presume the existence of such circumstances. In such cases the corporation and its stockholders may be estopped from avoiding the contract or denying the existence of the requisite conditions. This is the extent to which the cases cited go, and none of them hold that there can be an estoppel where the contract could not, under any conditions, be made by the corporation. To so hold would be equivalent to saying that a corporation could make any contract in excess of its powers and in violation of the laws and policy of the state, for no other reason than because it had made such contract. A usurpation of power where the other contracting party had full notice of the illegality of the act, would operate, under such a rule, to confer power. We do not think that such a rule could prevail.

"It is suggested that this contract might be operative to confer upon bondholders an equitable right to vote the shares of stock, but it is sufficient to say, respecting that claim, that such was not the contract. The contract was that they might vote as bondholders, and there was no intention of depriving stockholders of the right to vote.

"The judgment will be affirmed."

From this judgment an appeal was taken to the supreme court.

*Jack & Tichenor*, for the appellant.

*R. J. Cooney*, state's attorney, and *Stevens & Horton*, for the appellee.

<sup>346</sup> **BAKER, J.** We think that the opinion of the appellate court aptly and accurately states both the facts and the law of the case. In the brief and argument for appellant filed in this court it is claimed that the reasons given by that court for the affirmance of the judgment are not satisfactory. The gist of this contention, as we understand counsel, is, that the judgments below are in direct antagonism to the plain provisions of a contract entered into by and between individuals in all respects fully competent to act in relation to the matter involved, and that to declare the contract void in this collateral proceeding is to impair the rights of contracting parties fully capable of contracting as between each other, and plainly in derogation of legal principles.

The several contracts here involved were not contracts between natural and individual persons, but all contracts to which the corporation was a party. The by-laws were established by the corporation itself, acting as a corporate body. The proposition of Moran and Denny to subscribe stock and to transfer the already constructed railroad owned by them to the Toledo, Peoria, & Western Railway Company, was made to said company after its organization under the laws of the state, and was accepted by the board of directors and <sup>347</sup> the incorporators and stockholders of that company, acting for and as that company; and the trust deed, bonds, and certificates of stock, which are the instruments under and by virtue of which the bondholders claim the right to vote at the meetings of the stockholders, are all instruments that were executed, issued, and delivered by the railway company. The supposed contract right to vote is based upon and grows

out of instruments and contracts made by the company as a corporate entity and not otherwise.

It is claimed by counsel that in *Lorillard v. Clyde*, 86 N. Y. 384, a like agreement with that here in question was held by the court to be valid. That case was wholly unlike this in many respects. The corporation was not a party to the contract there in suit. The agreement of June 14, 1874, was made prior to the organization of the corporation, and was made between the plaintiff, Lorillard, and the firm of William P. Clyde & Co., and provided for a consolidation of business and property, and for the formation of a corporation and a corporate management of the consolidated business. It also contained numerous other provisions, and it was for a breach of some of these other provisions of that contract that the suit was brought. Another very material difference between the cases is, that there nothing was provided for in the agreement that was "inconsistent with the provisions of the statute or immoral in itself," while here, that which was provided for in the contract was explicitly prohibited both by the statute and constitution of the state. An agreement to do an act forbidden by the statute is not binding: *Penn v. Bornman*, 102 Ill. 523; *Cincinnati Mutual Health Assn. v. Rosenthal*, 55 Ill. 85; 8 Am. Rep. 626; *Rockhold v. Canton Masonic Ben. Soc.*, 129 Ill. 440; 26 Ill. App. 152. And it would be absurd to say that either persons or corporations can abrogate such a statute, upon the theory of an estoppel, by simply contracting to do the prohibited act.

<sup>268</sup> It is urged that Messrs. Moran and Denny received and held the stock of the company in terms subject, to the right of the bondholders to vote, and that the relator herein, with full knowledge of the provision inserted in both bonds and certificates of stock, was enabled to purchase his stock at the depreciated value which it had by reason of the fact that it was taken and held subject to the right of the bondholders to vote; that the stock is subject to certain fixed conditions, which constitute an infirmity attached to the stock itself, and that when he purchased the stock he assumed and agreed to take and hold it subject to the right of the bondholders to vote at the meetings of the stockholders. And in the same connection it is also urged that Messrs. Moran and Denny sold these bonds upon the market; that the stipulation in question undoubtedly gave the bonds a market value which they otherwise would not have had, and

that they, Moran and Denny, received whatever enhanced value they were enabled to obtain by reason of the provision for the protection of the bondholders and the conservation of the capital invested by them in the enterprise, and that therefore Moran and Denny, as holders of the stock and the assignees of such stock, with knowledge of the provision inserted in the certificates of stock, should hold the stock subject to such provision. This seems to us to be a partial and incorrect view of the matter. Both the constitution of the state and the statute under which the railway company was organized make provision for the election of the directors or managers of all such companies by the stockholders, and further provide that "such directors or managers shall not be elected in any other manner." It is therefore to be presumed that the relator, when he purchased his stock, knew that the stipulation and provision in question were directly contrary to the constitution and statute, and consequently void, and for that reason was willing to pay, and did pay, a larger consideration for ~~the~~ the stock than he otherwise would have paid. And the bondholders are also chargeable with notice of the requirements and restrictions of the public statute under which the corporation was formed, and were therefore bound to know, and did know, when they received or purchased their bonds, that the stipulation giving them the right to vote at any and every meeting of the stockholders was in palpable and absolute conflict with the prohibitions of that statute, and necessarily null and void.

The sections of the statute that are quoted at length in the opinion of the appellate court indicate quite clearly that it is a part of the public policy of the state that the corporate business and affairs of railroad companies shall be managed and controlled by directors who are not only stockholders themselves, but who are likewise elected by the votes of those who are also stockholders. It is for the interest of the state and of the public that railroad companies be successfully managed, so that they will well and promptly perform the public duties that devolve upon them, and afford all necessary facilities for the safe transportation of persons and property. The interest of the shareholders depends upon the success of the corporation, and the public is interested in having railroad corporations managed and controlled by those who will profit by keeping up the property and by careful management, rather than by bondholders, whose

interest, frequently, with a view to foreclosure and future ownership, lies in a depreciation in the condition and value of the property, and in a shrinkage of the revenues of the company. It would seem that a contract which annuls these statutory provisions is against public policy, and a fraud upon the statute under which the corporation is organized and from which it derives all its powers.

The judgment of the appellate court is affirmed.

Judgment affirmed.

**CORPORATIONS—BY-LAW INCONSISTENT WITH LAW.**—The power of a corporation to make by-laws is limited by the nature of the corporation and the laws of the country. It can make no rule contrary to law, good morals, or public policy: *Sayre v. Louisville etc. Assn.*, 1 Duvall, 143; 85 Am. Dec. 613, and note. The by-law of a corporation is void if contrary to law: *In the Matter of the Election of Directors, etc.*, 19 Wend. 37; 82 Am. Dec. 429. See especially the extended note to *People's etc. Sav. Bank v. Superior Court*, 43 Am. St. Rep. 153.

**CORPORATION.**—A party dealing with a corporation must take notice of the general law of the state under which the power exercised by the corporation was reserved: *Macon etc. R. R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135. Notice of the powers and legal capacity of a corporation is indisputably imputed to all persons contracting with it: *Elevator Co. v. Memphis etc. R. R. Co.*, 85 Tenn. 703; 4 Am. St. Rep. 798, and note; *Jemison v. Citizens' Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 432, and note.

## BOARD OF EDUCATION v. BLODGETT.

[155 ILLINOIS, 441.]

**A MUNICIPAL BOND ISSUED FOR MONEY NOT BORROWED NOR USED for a purpose for which the municipality was authorized to issue bonds is void.**

**STATUTE OF LIMITATIONS.**—THE COMPLETE BAR OF THE STATUTE OF LIMITATIONS IS A VESTED RIGHT, and therefore the legislature cannot authorize the assertion of a claim if such bar has become final.

**CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS, PROPERTY RIGHTS OF.**—The property rights of municipal corporations are protected by the same constitutional guaranties which shield the property rights of individuals from legislative aggression.

**STATUTE OF LIMITATIONS—MUNICIPAL CORPORATIONS.**—AFTER A STATUTE OF LIMITATION HAS COMPLETELY BARRED the right to assert an obligation against a municipal corporation the legislature cannot revive it.

*Fifer & Phillips*, for the appellant.

*John E. Pollock and A. J. Barr*, for the appellee.

443 **BAKER, J.** The board of education of Normal school district, defendant below and appellant here, was incorporated



in 1867 by special act of the legislature: 3 Private Laws 1867, p. 329. The act by which it was incorporated was declared to be a public act. On July 15, 1867, the board borrowed of W. E. Woodward fifteen hundred dollars, and issued to him therefor three bonds, for the sum of five hundred dollars each, and numbered, respectively, 30, 31, and 32, said bonds bearing interest at the rate of ten per cent per annum, payable semi-annually. Said bonds were afterward purchased from the holders thereof by Charles H. Blodgett, appellee herein, at their full face value. He held them until after their maturity, when new bonds of like import, numbered 60, 61, and 62, respectively, and dated September 1, 1873, and running five years, were issued to him in lieu thereof. On March 2, 1874, the board executed and delivered to appellee a certain other bond for five hundred dollars, numbered 77, said bond bearing date said March 2, 1874, running five years, and drawing ten per cent interest, payable semi-annually. The bond states upon its face that it was issued in lieu of bond No. 36, surrendered, and the consideration therefor, five hundred dollars, was paid by appellee to the treasurer of the board. Interest was paid on the original bonds until their maturity, and on bonds 60, 61, 62, and 77 up to September 1, 1877, but no interest has been paid on any of them since that date.

Section 9 of the charter of the board of education of Normal school district reads as follows: "For the purpose of erecting schoolhouses and purchasing school-sites it shall be lawful for said board to borrow at a rate of interest not exceeding ten per cent per annum, and issue bonds therefor in sums not less than one hundred dollars, which bonds shall be executed by the president and clerk of said board, in the name of the board, and countersigned by the treasurer of the board, and to secure the <sup>444</sup> payment of said bonds said board may mortgage any part or the whole property belonging to said board." And it is stipulated and agreed in the case at bar that the money for which the above-mentioned bonds were given was not borrowed or used by the board of education for any purpose for which said board was authorized, by its charter, to issue bonds. The board of education had no power to issue the bonds, and they were void. It was so held by this court, in 1880, in the case of *Hewitt v. Board of Education*, 94 Ill. 528.

Afterward, an act was passed by the legislature, which was

approved June 17, 1893, and in force July 1, 1893, and which act was as follows:

"An act to amend an act entitled 'An act in regard to limitations,' approved April 4, 1872, in force July 1, 1872.

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That an act entitled 'An act in regard to limitations,' in force July 1, 1872, be and the same is hereby amended, by adding thereto the following, to be numbered section 27:

"SEC. 27. That when any person has paid money into any incorporated school district of this state, and bonds have been issued by such corporation therefor, which are illegal, and where the statute of limitations has run against the recovery of the original consideration for which said bonds were issued, then, in such case, the statute of limitations is hereby extended, and the person so paying money for such illegal bonds, or his legal representatives or assigns, shall have a right of action in his own name, or as such representative, against such corporation, for one year from the time this act takes effect, and not after, to recover the amount of the original consideration paid for such bonds, together with six per cent interest per annum on such original consideration from the date that interest ceased to be paid on such bonds until July 1, 1891, and five per cent interest per annum thereafter": Laws 1893, p. 139.

445 Thereupon, on July 6, 1893, and in less than a week after the act went in force, appellee brought this action of assumpsit in the McLean circuit court to recover the amount of the original consideration paid for the above-mentioned bonds, with interest. The declaration consisted of the consolidated common counts. Appellant interposed the general issue and a plea of the five years statute of limitations, and appellee replied to the latter plea, counting upon the act approved June 17, 1893, concerning limitations. The case was finally submitted to the court under a stipulation which waived formal issues on the pleadings, both parties to have the full benefit of all the facts appearing in the agreed state of facts signed by them. The stipulation of facts and the bonds were all the evidence offered. The court, upon that evidence, found the issues in favor of the plaintiff below, and rendered judgment against the defendant below for three thousand nine hundred dollars damages and costs of suit, and from that judgment this appeal was prosecuted.

The principal question at issue in the case is in regard to the constitutionality and validity of the act approved June 17, 1893. The claim of invalidity is based on various contentions made by appellant. One of these contentions is that the act is in violation of the last clause of section 22 of article 4 of the constitution of Illinois, which provides as follows: "In all cases where a general law can be made applicable no special law shall be enacted." Another is that the act is a partial, unequal, and invidious statute, and for that reason forms no part of that "law of the land" in accordance with which, by the rule of the common law and by the mandate of section 2 of the bill of rights in the state constitution, all men are entitled to have their rights determined. Another is that, under the constitution, the legislature cannot create a debt against a municipal or school corporation for corporate purposes, and subject it to a tax for its payment, without its consent. And the other is that <sup>448</sup> the statute is in conflict with the rule that when the bar of a statute of limitations has become complete by the running of the full statutory period the right to plead the statute as a defense is a vested right, which cannot be destroyed by legislation, since it is protected therefrom by section 2 of the bill of rights incorporated in the state constitution, which declares that "no person shall be deprived of life, liberty, or property without due process of law." We will consider the last of these contentions only.

It has been stated so frequently in decisions and in the books that "due process of law" and "law of the land" mean one and the same thing, that it may be regarded as elementary.

As early as 1820 this court decided, in effect, that a completed bar of the statute of limitations is a vested right. In March, 1819, the first legislature of the state enacted "that all the laws and parts of laws passed by or under the authority of any territorial government heretofore existing, be, and they are, hereby repealed." A *proviso* excepted certain statutes of the territorial government, but did not except the statutes of limitation theretofore in force, and there was no saving clause that applied to them. The same legislature passed an act for the limitation of actions: Laws 1819, pp. 141, 351, sec. 8. In *Naught v. Oneal*, Appendix to Breese, 29, Beecher's Breese, 36, the court, in deciding a demurrer to a replication, said: "If the cause of action accrued one year or

more before the repeal of the statute of limitations, still the old statute of limitations is a good bar to the action. It is a complete bar before the repeal, and the repeal of a statute does not affect the rights acquired under the repealed statute." The question, as detached from tangible property, does not seem to have arisen in this court since that date until now.

The doctrine, as we understand it, is well and correctly stated in Cooley on Constitutional Limitations, <sup>447</sup> sixth edition. On page 448 he says: "When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been if it had been perfected in the owner by grant or any species of assurance." And on page 454 he says: "Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation." The same doctrine is stated by other text-writers in perhaps different, but equally strong, language: Sutherland on Statutory Construction, sec. 480; Wood on Limitations, secs. 11, 12, pp 26, 30.

In almost all of the states of the union in which the question has arisen it has been held that the right to set up the bar of a statute of limitations as a defense to a cause of action, after the statute has run, is a vested right, and cannot be taken away by legislation, either by a repeal of the statute without saving clause or by an affirmative act, and that it is immaterial whether the action is for the recovery of real or personal property, or for the recovery of a money demand, or for the recovery of damages for a tort: *Brown v.*

*Parker*, 28 Wis. 21; <sup>448</sup> *Davis v. Minor*, 1 How. (Miss.) 183; 28 Am. Dec. 325; *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344; *Girdner v. Stephens*, 1 Heisk. 280; 2 Am. Rep. 700; *Kinsman v. Cambridge*, 121 Mass. 558; *Bigelow v. Bemis*, 2 Allen, 496; *Stipp v. Brown*, 2 Ind. 647; *Ryder v. Wilson*, 41 N. J. L. 9; *McKinney v. Springer*, 8 Blackf. 506; *Boldro v. Tolmis*, 1 Or. 176; *Ball v. Wyeth*, 99 Mass. 338; *Prentice v. Dehon*, 10 Allen, 353; *Yancy v. Yancy*, 5 Heisk. 353; 13 Am. Rep. 5; *Bradford v. Shine*, 13 Fla. 393; 7 Am. Rep. 239; *Moore v. Luce*, 29 Pa. St. 260; 72 Am. Dec. 629; *Couch v. McKee*, 6 Ark. 484; *Woodman v. Fulton*, 47 Miss. 682; *Wires v. Farr*, 25 Vt. 41; *Rockport v. Walden*, 54 N. H. 167; 20 Am. Rep. 181; *Lockhart v. Horn*, 1 Woods, 628; *Harrison v. Stacy*, 6 Rob. (La.) 15; *Thompson v. Read*, 41 Iowa, 48; *Atkinson v. Dunlap*, 50 Me. 111; *Whitehurst v. Dey*, 90 N. C. 542; *McMerty v. Morrison*, 62 Mo. 140. The rule, however, is held to be otherwise as to debts, in Texas and in Alabama: *Bentick v. Franklin*, 38 Tex. 458; *Jones v. Jones*, 18 Ala. 248.

Great reliance is placed by appellee on the prevailing opinion in *Campbell v. Holt*, 115 U. S. 620, where it was held that a debtor has no property in the bar of a statute of limitations as a defense to a promise to pay a debt, and that such bar, after it has become complete, may be removed by a statute. The decision, however, was by a divided court, there being a vigorous dissenting opinion by Justice Bradley, which was concurred in by Justice Harlan. The doctrine of the dissenting opinion is most in consonance with former decisions of this court, and is supported by the great weight of authority. That opinion seems to us to present the better view. It expresses so strongly and so well our understanding of the law that we will quote from it at some length. The learned justice says that the constitutional provision that forbids that any person should be deprived "of life, liberty, or property without due process of law," was intended to protect every valuable right which a man has. He then adds: "The words 'life, liberty, and property' are constitutional terms, and are to be taken <sup>449</sup> in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess outside of himself—that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment it

would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours a very large proportion of the property of individuals is not visible and tangible, but consists of rights and claims against others or against the government itself. Now, an exemption from a demand or an immunity from prosecution in a suit is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guarantees and that the other is not seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperiled by an action against me for money as it is by an action against me for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defense to such an action of the greatest value to me? If it is not property in the sense of the constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property. The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself. It is a right founded upon a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses. It is true that a man may plead the statute when he justly owes the debt for which he is sued; and this has led the courts to adopt strict rules of pleading and proof to be observed when the defense of the statute is interposed. But it is, nevertheless <sup>also</sup> a right given by a just and politic law, and, when vested, is as much to be protected as any other right that a man has. The fact that this defense pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of a remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defense is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other, in this respect."

The political rights and privileges delegated to counties, school districts, and cities are not within the constitutional provisions against laws which impair vested rights, but their property rights are protected by the same constitutional guaranties which shield the property of individuals from legislative aggression: *People v. Mayor etc. of Chicago*, 51 Ill. 17; 2 Am. Rep. 278; *Richland County v. Lawrence County*, 12 Ill. 1; *Milam County v. Bateman*, 54 Tex. 153; *Trustees v. Mayor*, 13 Smedes & M. 645; *Grogan v. San Francisco*, 18 Cal. 590; *City of Dubuque v. Illinois Cent. R. R. Co.*, 39 Iowa, 56.

In our opinion the act of June 17, 1893, amendatory of the act in regard to limitations, is unconstitutional and invalid. It follows that the circuit court erred in its rulings upon some of the propositions of law submitted to it, and in rendering judgment against the defendant.

The judgment is reversed.

Judgment reversed.

**MUNICIPAL CORPORATIONS—LEGISLATIVE INTERFERENCE WITH PROPERTY RIGHTS OF.**—There is no limit to the control which the legislature may exercise over property acquired and held by a municipal corporation, provided such control is consistent with the preservation of the property, or of its proceeds for the uses and purposes for which it was acquired: *Coyle v. McIntire*, 7 Houst. 44; 40 Am. St. Rep. 109, and note. This question is fully discussed in the monographic notes to *Mt. Hope Cemetery v. Boston*, 35 Am. St. Rep. 529-540, and *Hasbrouck v. Milwaukee*, 80 Am. Dec. 731.

**LIMITATIONS OF ACTIONS—VESTED RIGHTS.**—After a cause of action has become barred by the statute of limitations a defendant has a vested right to rely on that statute as a defense, and the legislature cannot divest him of such right: *Girdner v. Stephens*, 1 Heisk. 280; 2 Am. Rep. 700; *Rockport v. Walden*, 54 N. H. 167; 20 Am. Rep. 131.

**MUNICIPAL CORPORATIONS—BONDS.—EFFECT OF UNAUTHORIZED ISSUE OF:** See the extended note to *De Voss v. City of Richmond*, 98 Am. Dec. 636.

## LAKE ERIE & WESTERN RAILROAD COMPANY v. WHITHAM.

[155 ILLINOIS, 514.]

**CONVEYANCE BY HUSBAND AND WIFE.**—THOUGH THE NAME OF A WIFE IS PLACED AFTER that of her husband in a conveyance it will not be presumed that she joined therein merely for the purpose of waiving her dower, when by the terms of the instrument she appears as one of the parties conveying and quitclaiming all her interest in the land described therein.

**DIED.—ACKNOWLEDGMENT.**—THE OMISSION OF A NOTARY PUBLIC TO WRITE THE NAME OF HIS OFFICE under his signature does not vitiate his cer-

tificate of acknowledgment, in the body of which he is described as a notary public.

**DELIVERY OF A DEED IS PRESUMED TO HAVE BEEN ON THE DAY OF ITS DATE**, though it was subsequently acknowledged. Nor is this presumption rebutted by evidence that it did not come to the personal possession of the grantee until after it was acknowledged, if it was procured by an attorney acting for him in another county.

**DEEDS, DESCRIPTION.**—If a deed describes land by metes and bounds, and then states that it is all of a tract of land (giving another description), and the two descriptions are not synonymous, effect will be given to the larger and less restricted description, and the result will be that the deed will operate as a conveyance of the land contained in both descriptions.

**DEED.—THE DELIVERY OF A DEED DATED ON THE DAY THE SUIT WAS BROUGHT** is *prima facie* established to have been before such suit was commenced, by the undisputed testimony of the grantee that it was delivered before the suit was commenced, though he further testifies that he was in another county on that day, and does not clearly show how he knew the precise moment of the commencement of the action, and reached the conclusion that it was after the delivery of the deed.

**EJECTMENT—TITLE FROM COMMON SOURCE.**—If a plaintiff files an affidavit, showing from whom he claims title, and stating that he understands defendant to claim from the same source, and the defendant does not controvert such affidavit, it will be sufficient for the plaintiff to trace title from the common source thus designated by him.

**DEDICATION OF LANDS FOR RAILWAY PURPOSES** cannot be effected by a common-law dedication, but only in the manner prescribed by statute or by a conveyance executed by the owner.

**COMMON LAW.—A DEDICATION OF LANDS CAN BE FOR PUBLIC PURPOSES** only. Railway companies are private corporations, and therefore cannot acquire lands or an easement therein by common-law dedication.

*H. M. Steely*, for the appellant.

*Salmons & Draper and C. A. Allen*, for the appellee.

<sup>517</sup> **BAILEY, J.** This was a suit in ejectment, brought by Eugene H. Whitham, against the Lake Erie & Western Railroad Company, to recover a strip of land forty or fifty feet in width, and nine hundred and sixty-five feet long, lying <sup>518</sup> between the north line of blocks 13 and 14, in the village of Rankin, Vermilion county, and the north line of the southeast quarter of section 11, township 23, north of range 14 west, being a part of the land claimed by the defendant as its right of way. The suit was brought November 29, 1892, the declaration consisting of one count, which describes the premises, and alleges that the plaintiff is the owner thereof in fee simple. The defendant pleaded not guilty, and at the trial, which was had at the May term, 1894, of the circuit court, a verdict was rendered finding the



defendant guilty, and finding that the title to the premises established by the plaintiff was in fee simple. Upon this verdict the court, after denying the defendant's motion for a new trial, gave judgment in favor of the plaintiff, and the defendant now brings the record to this court by appeal.

It appears from the evidence that the village of Rankin was laid out and platted about November 14, 1872, and that the plat, with the accompanying certificates, was filed for record in the office of the recorder of Vermilion county, November 28, 1872. The railroad in question, of which the defendant is now the owner, is located near the north line of the land in controversy, and seems to have been built and in operation before the plat of the village of Rankin was filed for record, it having been built by a railroad company of which the defendant is or claims to be the successor. At the point in question the railroad runs east and west, and is crossed by Main street, a street running north and south, near the center of the village. At the time the village was platted William A. Rankin and David Rankin, for whom the village was named, owned the west half of section 12, on which that part of the village east of Main street was platted, while George Guthrie owned the northeast quarter of section 11, or all that part of the plat lying west of Main street and north of the railroad, and the heirs of Stanton S. Johnston, deceased, owned the southeast quarter of <sup>51st</sup> section 11, being that part of the land included in the plat lying west of Main street and south of the railroad.

The evidence tends to show that, at the time the village of Rankin was platted, there was great rivalry between Rankin and a small place about a mile and a half further west, known as Pellsville, as to which should secure the railroad station, and that the owners of the land embraced in Rankin were disposed to offer very considerable inducements to the railroad company for the purpose of securing the station for their own village. William A. Rankin seems to have been employed by the Johnston heirs in platting their part of the village, and the evidence tends to show that they agreed to give him each alternate two lots throughout the plat if he would secure the station; that Rankin, acting for the Johnston heirs, had the surveying done, some of the heirs being present and one or more of them assisting in making the survey.

The evidence further tends to show that the proprietors of

the several tracts of land to be included in the plat instructed the surveyor to leave sufficient ground on each side of the railroad track to make, with the right of way already acquired by the railroad company, a strip one hundred feet in width, and that in pursuance of such instructions he surveyed and laid out the grounds, and made the plat so as to leave one hundred feet on each side of the railroad through the entire village, and there is evidence tending to show that it was the intention of the parties that the ground so left should be railroad ground, and should be occupied and used for railroad purposes.

The strips of land thus left not being "marked or noted on the plat as donated or granted" to the railroad company, it is not, and cannot well be, claimed that the plat operated as a conveyance thereof to the railroad company under the provisions of section 3 of chapter 109 of the Revised Statutes, but it is contended, on behalf of <sup>520</sup> the company, that the plat, when considered in connection with the evidence of the contemporaneous and subsequent acts and conduct of the parties, tends to establish a common-law dedication of the land to the company, for its use as a part of its right of way. This contention, which raises one of the principal questions presented by the record, will be more fully noticed hereafter.

The plaintiff, to establish title in himself to the lands in question, offered in evidence certain proceedings in chancery between the heirs of Stanton S. Johnston, deceased, for partition, in which it was alleged in the bill and found by the decree that Stanton S. Johnston, in his lifetime, was seised of an equitable estate in these lands by virtue of a contract for the sale thereof to him by the Illinois Central Railroad Company, and that after his death certain deeds were executed, by which the legal title was conveyed to his heirs. Evidence was also given, not only that his heirs were thus claiming title in fee to the land, but that before the village of Rankin was laid out and platted they were in possession of it. The plaintiff then offered in evidence quitclaim deeds to himself from each of the heirs of Johnston, purporting to convey to him all their right, title, and interest in the land. Several specific objections to these deeds were raised, all of which were overruled, and the deeds were read in evidence. The decisions of the court overruling these objections are now assigned for error.

Harriet M. Hutchinson is one of the heirs of Johnston, and

one of the deeds offered in evidence purports to be executed by Joseph M. Hutchinson and Harriet M., formerly Harriet M. Johnston, his wife, party of the first part, to the plaintiff, party of the second part, and in which the party of the first part, for a certain consideration therein mentioned, convey and quitclaim to the party of the second part all interest in the land in question. It is objected that because the name of the wife is placed after that of her husband it will be intended that <sup>521</sup> she joined with her husband merely for the purpose of waiving her dower, and not for the purpose of conveying her estate. It is sufficient to say that, even if such intendment could arise under other circumstances, it is completely negatived here by the very terms of the instrument, since she appears in the deed as one of the parties conveying and quitclaiming all interest in the land. To hold otherwise would do violence to the express language of the deed.

Again, it is objected that the certificate of acknowledgment is insufficient because the officer before whom the acknowledgment was taken, though describing himself in the body of the certificate as a notary public, omitted to write the name of his office under his official signature. As he professes, in the body of his certificate, to be a notary public and to be acting officially, we are of the opinion that the omission of the words "notary public" after his signature cannot have the effect of rendering his certificate invalid. His official character, and the fact that he was acting officially, we think sufficiently appear. The objections to this deed were properly overruled.

A deed from William A. Rankin and Mary D. Rankin, his wife, bearing date November 23, 1892, was objected to on the ground that the certificate of acknowledgment bears date December 2, 1892, the latter date being after the suit was commenced. The presumption is that the deed was delivered on the day of its date, and the fact that the certificate of acknowledgment bears a later date is not sufficient to rebut such presumption: *Deininger v. McConnel*, 41 Ill. 227; *Jayne v. Gregg*, 42 Ill. 413; *Blake v. Fash*, 44 Ill. 302; *Hardin v. Crate*, 78 Ill. 533. There is evidence tending to show that the deed was executed and acknowledged in a different county from that in which the plaintiff resided, and that its execution was procured for him by his attorney in that county, and while he testifies that it did not come into his personal possession <sup>522</sup> until after it was acknowledged, there is no evi-

dence, outside of that furnished by the dates appearing upon the instrument itself, tending to show the date of its delivery to his attorney. To rebut the presumption of its delivery on the day of its date it was necessary, under these circumstances, to produce some evidence as to the time of its delivery to the plaintiff's attorney, and, there being none, the presumption cannot be said to be rebutted.

It is next claimed that the deed from Jane M. Johnston, William O. Johnston, Scott Johnston, and Martha E. Johnston, to Benjamin R. Cole, conveyed the interest of the grantors in only a part of the land in controversy, and, consequently, that the plaintiff has failed to show that he has become vested with their title to the residue. This deed purports to convey and quitclaim all the interest of the grantors "in the following described real estate." Then follow two descriptions, the first of which describes, by metes and bounds, the land lying between block 14 and the north line of the quarter section. The other description, which in the deed appears in a separate sentence, is as follows: "Being all of that part of above-described quarter section lying between the north line of said quarter section and blocks 18 and 14, in the village of Rankin." Here are two descriptions, each complete in itself, one embracing only that portion of the quarter section lying north of block 14, and the other that portion lying north of both blocks. It seems plain that, under these circumstances, effect must be given to the larger as well as to the more restricted description. Such interpretation does no violence to either, but gives full force to both. Were there any necessary incongruity between the two, the more restricted description might perhaps be rejected, so long as the conclusion fairly arises from the entire instrument, that the grantors intended to convey their interest in the whole tract; but, there being no such incongruity between them, nothing <sup>523</sup> need be rejected, and all parts of the description may be retained and given force.

It is also claimed that the deed from Cole and wife to the plaintiff is not shown to have been delivered before the commencement of the suit. That deed bears date November 23, 1892, and the certificate of acknowledgment is dated November 29, 1892. The suit was brought on the date last named, and the plaintiff testifies that the deed was received by him directly from Cole, and that he received it the day it was acknowledged, but that it came to his hands before the suit

was commenced. His testimony upon this point is sought to be weakened, on his cross-examination, by eliciting from him the fact that he, on the day the deed was received, was in Rankin, while the suit was commenced at Danville, and therefore that he could not have known the exact time of the issuing of summons in the suit. He, however, persists in saying that according to his understanding the suit was not commenced at Danville until after the deed was delivered to him at Rankin, and there being no evidence to the contrary, we think his testimony, while not very satisfactory, is sufficient to show, *prima facie*, that the deed came to the plaintiff's hands before the summons in the suit was issued.

It is contended, in the next place, that the verdict and judgment for the plaintiff are unsupported by the evidence, because the plaintiff failed to deduce his title from the United States, or any other original source of title. It is claimed, on the other hand, that a *prima facie* title is shown by deducing title from the Johnston heirs, who are shown to have been in possession of the land claiming title in fee. The plaintiff also sought to bring his case within the provisions of section 25 of chapter 45 of the Revised Statutes. Upon the trial he stated, on oath, that he claimed title from the Johnston heirs, and that, as he understood it, the defendant claimed title from the same source. This, we think, was sufficient to <sup>524</sup> require the defendant, or its agent or attorney, to deny, on oath, that it claimed title through such source, or that it claimed title through some other source, in order to compel the plaintiff to deduce title from any other than such common source. No such denial was made, on oath, by or on behalf of the defendant, and we think, therefore, it was sufficient, *prima facie*, for him to trace his title to such common source.

The principal contention on the part of the defendant, however, seems to be that the Johnston heirs, at the time the village of Rankin was laid out and platted, intended to dedicate, and, in fact, dedicated, the premises in question to the railroad company of which the defendant is the successor, to become a part of its right of way, to be used for railroad purposes. It seems to be conceded that the strip of land in question was not "marked or noted on the plat as donated or granted" to the railroad company, and it is not, and cannot well be, claimed that the plat operated as a conveyance thereof to the railroad company under the provisions of sec-

tion 3 of chapter 109 of the Revised Statutes, but it is insisted that the plat, when considered in connection with the evidence of the contemporaneous and subsequent acts and conduct of the parties, tends to show a common-law dedication of the land to the company.

The evidence bearing upon the question of a common-law dedication is conflicting, some of the witnesses, especially some of the Johnston heirs themselves, testifying positively that there was no intention on the part of the heirs to make such dedication; but, as the question is presented here, we need consider only the evidence introduced on the part of the defendant to show such dedication.

The county surveyor who made the survey and plat was examined as a witness, and his testimony, so far as it relates to the strip taken from the land belonging to the Johnston heirs, being the premises in controversy in <sup>525</sup> this suit, is as follows:

"I was county surveyor at the time the village of Rankin was platted and laid out. I made the survey and plat. I recollect the circumstances of there being a strip of land left north of blocks 13 and 14 in that plat. There was a strip one hundred feet wide left along each side of the center of the road as it was then running. In making that plat I made a plat of the whole town. That strip was left at the time, as I understood it, for the railroad company. I think some of the Johnston heirs were assisting in making the plat. I think William O. Johnston carried chain for me. That strip has been used for railroad grounds ever since, so far as I know. I have been back there since that time every year or two, at different times. Mr. Rankin was overseeing and looking after the platting of the grounds. He employed me, and paid me for doing the whole work. He was with me during the platting. I suppose he was acting for the Johnston heirs in the platting of the ground. He was there all the time, and the Johnston heirs, or some of them, were there all the time while I was acting. They told me to leave one hundred feet on each side of the track—that they were willing to give almost any amount of land to the railroad to get the station there—and I did so, and that was made and signed by the different parties, and recorded. Why, certainly it was left for railroad ground, and that was the purpose of it. I do not remember any particular conversation with the Johnston heirs, it being twenty-two years ago. They were all mighty

anxious to get the town there, and they were fighting the town a mile distant. There was a great rivalry at that station and the station a mile or a mile and a half west of it for the town. They were each fighting to get the station. There was great rivalry. I do not know what inducements they had offered, but they were willing to give most any thing to the railroad to locate the station there. They were willing to give this ground and any thing else." Again, on cross-examination, he says: "I don't <sup>526</sup> know that any thing was said by the owners as to what use that land was to be put to. I know that it was not left for the owners to use themselves. I know it was called railroad ground. I understood by that that it was for the exclusive use of the railroad."

The evidence shows that shortly after the plat was recorded the railroad company entered into possession of the strip of land in controversy and built a sidetrack, and also erected stockpens upon it, and that it and its successors have continued to occupy and use it from that time up to the commencement of this suit—a period of between nineteen and twenty years—claiming it as railroad property. It also appears that from the time the plat was recorded the Johnston heirs made no claim to this strip of land until a short time before the commencement of this suit, when, for a nominal consideration, they quitclaimed their interest to the plaintiff.

Upon this evidence the defendant's counsel asked the court to give to the jury various instructions upon the hypothesis of a common-law dedication, but the court refused to give any instruction of that character as asked, but modified them so as to limit their scope to a dedication by plat, thereby, in effect, refusing to instruct the jury that the defendant was capable of acquiring lands by a common-law dedication. Thus, the following instruction, being asked, was modified by inserting therein the words in italics, and given as thus modified:

"The court instructs the jury that a railroad corporation is a public corporation, and is an ever-existing grantee, capable of taking lands by conveyance, or by dedication, *by plat*, by the owner, for railroad purposes."

The following instruction also was asked on behalf of the defendant:

"The court instructs the jury that the word 'dedication' used in these instructions means an appropriation, or devotion or setting apart, by the former owners, of the land in

question for railroad purposes. A dedication <sup>527</sup> of land may be made by deed or writing, or it may be by acts or parol declarations of the owners, or both, without writing; and no particular form is required to establish its validity, it being purely a question of intention. A dedication may also be made by survey and plat alone, without any declaration, either oral or on the plat, when it is evident from the face of the plat that it was intended to set apart certain ground for the use of the public or for the use of a railroad company."

This instruction the court refused to give as asked, but modified it as follows, and gave it to the jury so modified:

"The court instructs the jury that the word 'dedication,' used in these instructions, means an appropriation, or devotion or setting apart, by the former owners, of the land in question for railroad purposes, by a plat. A dedication may be made by survey and plat alone, without any declaration, either oral or on the plat, when it is noted on the face of the plat that it was intended to set apart certain grounds for the use of the public or for the use of a certain corporation."

Other instructions, involving similar principles, were modified in a similar manner. The rule which the trial court thus intended to lay down manifestly was, that while a railroad company may take lands by dedication where the dedication is by plat executed in the form prescribed by the statute, it is incapable of taking lands by dedication in any other way, and especially that it cannot become the beneficiary of a common-law dedication. That there was evidence tending to show a common-law dedication to the railroad company, if such dedication is legally possible, cannot be doubted, and the question presented is, whether the court decided correctly in holding that no such dedication can be effectual as vesting a railroad company with the title or right of possession of the land attempted to be so dedicated to its use.

<sup>528</sup> It is doubtless true that any person who is the owner of land may, by virtue of his absolute dominion over it, donate or dedicate it to whomsoever he pleases. He may give it to the public, to a body corporate capable of holding it, or to a natural person, for such purposes, either public or private, as the donor may see fit to appoint. But to render such gift effectual the owner must grant or convey to the donee the land, or such interest therein as he wishes to donate, either by deed, or by some equivalent mode of convey-



ance known to the law. Except in what are known as common-law dedications, parol gifts of land, or of easements therein, are ineffectual, it being elementary law that the title to lands cannot be transmitted *inter vivos* except by deed or its equivalent, and that easements or other incorporeal hereditaments can not be created by parol, but only by grant, or by prescription, whereby a conclusive presumption of a previous grant is raised.

The provisions of chapter 109 of the Revised Statutes, entitled "Plats," furnish no exception to this rule—they merely create a new mode of conveyance. By force of those provisions the owner of the land, by platting it and marking or noting on the plat that portions of the land are donated or granted to the public, to a corporation, to a religious society or to a natural person, in legal effect conveys the portions of the land so marked or noted to the designated donee or grantee, for the uses and purposes therein indicated. By this statute the purposes for which an owner of land may dedicate or grant it away to others are not enlarged, restricted or modified, but a new mode is provided by which his intention to grant or convey his land may be carried into effect.

But by the rules applicable to what are known as common-law dedications, lands or easements therein may be dedicated to the public, so as to become effectually vested, without the aid of any conveyance. It may be done in writing, by parol, by acts *in pais*, or even by acquiescence <sup>529</sup> in the use of the easement by the public. All that is necessary is, that the intention to dedicate be properly and clearly manifested, and that there be an acceptance by or on behalf of the public. When that is done, the right of easement becomes instantly vested in the public.

But dedications of this character, to be effectual, must be to the public: Washburn on Easements, 205. At the common law they were confined to the purpose of highways, but in this country the doctrine has a wider application, and its limits have been judicially defined as extending to public squares, common lots, burying-grounds, school lots, and lots for church purposes and pious and charitable uses generally, and in many cases where the use was, either expressly or from the necessity of the case, limited to a small portion of the public: 5 Am. & Eng. Ency. of Law, 416, and authorities cited in notes. But we are referred to no decision, and we think none can be found, where a dedication of this char

acter, made for any other purpose than one strictly public, has been sustained.

Railroad companies, though engaged in the public employment of common carriers, are essentially private corporations, and, while the lands composing their rights of way are acquired for a public purpose, the ownership of such lands, when acquired, is private. In no proper sense can such corporations be regarded as constituting the public, or a portion of the public, to which common-law dedications of land can be made. Donations or gifts of land can undoubtedly be made to them where the donor sees fit to effectuate his gift by some one of the ordinary modes of conveyance, and the donation can also be made by plat, where the donor sees fit to mark or note on his plat that the land which he wishes to give to such corporation is donated or granted to it; but we find no authority in the law for holding that a railroad corporation may acquire title to or an easement in land by common-law <sup>520</sup> dedication. Neither the researches of counsel nor our own have brought to light a single case sustaining such dedication, and we think none can be found.

Counsel seems to argue that because, under the statute, gifts or grants can be made to railroad companies and other corporations by plat, it should be held that common-law dedications may be made in like cases. This by no means follows. As we have already said, the statute makes the plat a mode of conveyance, thus enabling the donor of lands to accomplish, by its means, what, independently of the statute, he might have done by any other appropriate conveyance; but it in no way enlarges, either expressly or by implication, the class of cases where an easement may be created in favor of the public by common-law dedication. Moreover, the reasoning sought to be employed would prove too much. The statute makes the plat a conveyance, not only to the public and to corporations, but also to natural persons, and the same principles of analogy which would extend the doctrine of common-law dedications to railroad companies would make it apply as well to natural persons—a result for which we think no one will contend.

The case of *Morgan v. Chicago etc. R. R. Co.*, 96 U. S. 716, upon which much reliance seems to be placed, will be found, on examination, to have been a case of a dedication or conveyance of certain lands to the railroad company by plat, and the question of a common-law dedication, and

whether such dedication could be made to a railroad company, was not involved. That case, therefore, cannot be regarded as an authority upon the questions presented here. It should also be noticed that the suit was in equity—a forum where the doctrine of equitable estoppel has full play, and where there is always a strong indisposition to enforce stale claims, although they may not be barred by limitation, while this suit is in ejectment, where legal titles, only, are regarded.

<sup>531</sup> The case of *Smith v. Town of Flora*, 64 Ill. 93, to which we are referred, involved a question of a dedication of strips of land on each side of the right of way of the railroad company to the municipal corporation, and no question of a common-law dedication to a railroad company was raised or decided.

We fail to find in the record any substantial error, and the judgment of the circuit court will accordingly be affirmed.

Judgment affirmed.

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**ACKNOWLEDGMENTS—OFFICIAL CAPACITY—HOW MAY APPEAR.**—If the title of an officer taking an acknowledgment is written out fully in the body of the certificate its omission from the signature is immaterial: *Sumner v. Mitchell*, 29 Fla. 179; 30 Am. St. Rep. 106, and note, with the cases collected.

**DEEDS—DESCRIPTION—CONFLICT IN.**—If a parcel of land is described as being subdivision No. 25, as designated on a map of a block of land on file, and is also described by metes and bounds, and there is a conflict between the two descriptions, the former prevails: *Masterson v. Munro*, 105 Cal. 431; 45 Am. St. Rep. 57, and note.

**DEEDS—DELIVERY—PRESUMPTION AS TO TIME OF.**—The delivery of deeds is presumed to have been made at their date: *Purdy v. Coar*, 109 N. Y. 448; 4 Am. St. Rep. 491, and note; *Ward v. Dougherty*, 75 Cal. 240; 7 Am. St. Rep. 151, and note. See, also, the extended note to *Blanchard v. Tyler*, 86 Am. Dec. 63.

**DEDICATION—PRIVATE USES.**—Properly speaking there can be no dedication to private uses: *Trustees v. Mayor*, 33 N. J. L. 13; 97 Am. Dec. 696. The right of individuals of a community to enjoy profit in lands for private emolument cannot be acquired under a dedication to public uses: *Cobb v. Davenport*, 33 N. J. L. 223; 97 Am. Dec. 718. See the extended note to *State v. Trask*, 27 Am. Dec. 561.

**EJECTMENT—TITLE FROM COMMON SOURCE.**—Where plaintiff and defendant derive title from the same third person it is *prima facie* sufficient for plaintiff to prove such common derivation, without proving the title of such third party: Note to *Barrett v. Hinckley*, 7 Am. St. Rep. 341. This subject is discussed at length in the note to *Gilham v. Bird*, 49 Am. Dec. 382.

CASES  
IN THE  
SUPREME COURT  
OF  
INDIANA.

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**KAUFMAN v. STEIN.**

[188 INDIANA, 49.]

**NUISANCE—INJUNCTION AGAINST.**—An individual has the right to enjoin the erection or continuance of a nuisance which causes him to suffer a special injury or annoyance, different in kind and degree from that sustained by the public generally.

**NUISANCE—INJUNCTION—REMOVAL OF WOODEN BUILDING WITHIN FIRE LIMITS.**—A property owner has a right to enjoin the removal of a wooden building to a place within the fire limits in violation of a city ordinance forbidding it, if it is to be located within a short distance of his own frame house, thus making the danger imminent.

**MUNICIPAL CORPORATIONS—FIRE LIMITS.**—Municipal corporations have the power, under the general welfare clauses commonly contained in their charters, to establish fire limits and to forbid the erection or removal of wooden buildings within such limits.

**MUNICIPAL CORPORATIONS—FIRE LIMITS—REMOVAL OF HOUSES.**—Under an ordinance forbidding the removal of wooden buildings within established fire limits, a removal of such a building and its relocation twenty feet away from its former location on the same lot is such a removal as is prohibited by the ordinance.

**MUNICIPAL CORPORATIONS—FIRE LIMITS—PRESUMPTION.**—If the common council of a city has defined its fire limits by ordinance it is presumed to have done so with reference to the exact location of all buildings within such limits.

*T. W. Harper and A. B. Felsenthal*, for the appellant.

*J. Jump, J. E. Lamb, and J. C. Davis*, for the appellee.

49 DAILEY, J. This was an action for an injunction commenced by the appellant against the appellee. The appellee entered an appearance to the action, and filed a demurrer to the complaint, for the reason that the complaint "does not state facts sufficient to constitute a cause of action against

the defendant." The material allegations contained <sup>50</sup> in the complaint are as follows: 1. That plaintiff (appellant) is the owner of lot 31, in Rose's Addition to the city of Terre Haute; 2. That there are, upon said lot, a dwelling-house and other buildings; 3. That defendant owns an adjoining lot to plaintiff's said premises; 4. That upon defendant's lot there is a large frame building; 5. That both plaintiff and defendant's lots are within the fire limits of the city of Terre Haute; 6. That the common council of the city of Terre Haute had lawfully adopted an ordinance establishing "fire limits"; a copy of which is filed with the complaint and marked "Exhibit A," and which ordinance was in full force at the time of the commencement of this suit; 7. The ordinance provides that no wooden buildings shall be erected within said limits; that if such building has been heretofore erected within said limits, and it shall be removed, it shall not be relocated within the fire limits; 8. That defendant is about to remove the said frame building now on his lot and relocate the same within said limits, twenty feet nearer plaintiff's house, and within four feet of plaintiff's property, and ten feet from plaintiff's frame dwelling-house, thereby increasing the danger from fire, and making the danger imminent, increasing cost of insurance, etc; 9. That the defendant has the tools, men, and machinery ready to remove the same, and will do so unless restrained; 10. That defendant will not incase his said frame building with stone, iron, or brick, so as to render it fireproof. The court sustained the demurrer, to which appellant excepted and stood on his complaint, whereupon the court rendered judgment for appellee, from which ruling and action of the court appellant duly appealed. In the case here presented the complaint avers and the demurrer admits, that the removal and relocation of the appellee's frame building, as threatened, will put the appellant's <sup>51</sup> property in imminent danger from fire. From the briefs of counsel it appears that one point made by counsel for the appellee in argument on the demurrer before the court below was "that the plaintiff was not entitled to maintain this action, but that the city could alone enforce the penalty provided by the ordinance," "or in other words, that an individual could not have an injunction in such a case, even if the ordinance in question here was, in all its provisions, valid, as being within the power of the common council to adopt, because the only remedy in such case was by

a prosecution in the name of the city for a violation of the ordinance." Counsel say they do not rely upon this proposition. They concede that "where an individual shows that he suffers or will sustain special damages or injury, above and beyond what the public generally will suffer, by reason of any thing which may constitute an injury or damage to the public generally, he may maintain such an action as is proper in the given case to recover damages for, or to prevent the doing of, such a thing." An individual has, and always had, the right to enjoin the erection or continuance of a nuisance where he will suffer a special injury or annoyance, different in kind and degree to that sustained by the public generally: *Keiser v. Lovett*, 85 Ind. 240; 44 Am. Rep. 10; *Reichert v. Geers*, 98 Ind. 73; 49 Am. Rep. 736; *Owen v. Phillips*, 73 Ind. 284.

In *Baumgartner v. Hasty*, 100 Ind. 575, 579, 50 Am. Rep. 830, it is said: "It is one of the oldest of the common-law rules that an individual citizen may, without notice, abate a nuisance; and, if necessary to effectually abate it, destroy the thing which creates it." A wooden building is not a nuisance *per se*. It is the circumstances that make it a nuisance. A powder-mill is not a nuisance *per se*, nor is a slaughterhouse, or glue factory, but if located in populous neighborhoods they are nuisances. And "even <sup>53</sup> when they are originally built in a place remote from the habitations of men, or from public places, if they become actual nuisances by reason of roads being afterward laid out in their vicinity, or by dwellings subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads, or the erection of the dwellings, is no defense: Wood's Law of Nuisances, 572; *Reichert v. Geers*, 98 Ind. 75; 49 Am. Rep. 736; *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830. In the case last cited Elliott, J., says: "A wooden building is not, in itself, a nuisance, but when erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance. . . . There are many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law," etc: Citing Wood's Law of Nuisances, sec. 109.

We think the complaint under consideration brings this case within the rule thus laid down, as it is alleged that the building is a wooden structure; that it will be removed to a place within the fire limits, in violation of a city ordinance

forbidding it, and that it will be located within ten feet from the plaintiff's frame house, making the danger imminent.

Upon the proposition "that the common council of the city of Terre Haute had no power to pass the ordinance in question" it is insisted that "inasmuch as the charter had granted specific powers to the city . . . none other could be exercised."

The charter provisions are found in the Revised Statutes of 1881, section 3106; Burns' Revised Statutes, 1894, section 3541, subdivision 32, which provides that the common council shall have power "to prevent the erection of wooden buildings in such part of the city as the common council may determine." <sup>53</sup> Also, in sections 3198 and 3199 of the Revised Statutes of 1881, being sections 3661 and 3662, Burns' Revision, 1894.

It is clear that the specific power granted by subdivision 32, *supra*, is to prevent the "erection" of wooden buildings. Nothing is said about the "removal," and it is insisted, therefore, that so much of the ordinance as attempts to prevent the removal of wooden buildings within or without the fire limits is *ultra vires* and void, and in contravention of a common right of an owner to do as he pleases with his own property.

The provisions of the ordinance are, in brief, as follows:

Section 1 defines the fire limits.

Section 2 provides that no frame building shall be erected within the fire limits.

Section 3 provides a penalty for removing, or assisting to remove, any frame building from a point within or without to a point within the said fire limits.

Section 4 provides that any building so erected or removed shall be deemed a nuisance.

Section 5 provides against the location of lumber-yards within said limits.

Appellant admits that the authority to pass an ordinance against the removal of a wooden building is not specifically granted, but insists that it comes within the intention of the legislature. That the object of granting the power to the city was to enable the common council to take precautions against the destruction of the city by fire.

In the case of *Clark v. City of South Bend*, 85 Ind. 276, 44 Am. Rep. 13, the same point was presented that is now

urged, but the court said: "This is a more narrow view of the subject than the books warrant counsel in assuming."

If the ordinance in question concerning removals of buildings is so in derogation of common right as to be void, and if the common council is restricted in its legislative <sup>54</sup> Acts to such ordinances only as are literally in compliance with the statutes, it could not prohibit the removal of frame buildings, but only the erection thereof, within the limits, and any person so desiring could construct his house outside of the fire limits, and then remove it to a place within, and, by a series of removals, there might be no end of frame buildings brought within such limits. Such construction would permit parties to accomplish indirectly what they could not do directly, and so evade the ordinance as to render it nugatory. If the power is to be strictly construed, what is there to prevent the erection of a lumber-yard upon each vacant lot of the city? The express power is "to prevent the erection of wooden buildings." A lumber-pile is not a building, and there is no express power given the city to prevent a lumber-yard within the fire limits, yet who would question the inherent right of the council, in the exercise of its police power, to provide against and inhibit the keeping of such combustible material so as to endanger property rights?

In the case of *Clark v. City of South Bend*, 85 Ind. 276, 44 Am. Rep. 13, the ordinance prohibited the accumulation of straw. The court said: "There can be no doubt that the legislature meant to confer broad powers upon municipalities in the matter of providing against danger from fires."

And the ordinance was held valid, even though, as here, there was no express power.

It is simply a police regulation, and, as is said in *Brady v. Northwestern Ins. Co.*, 11 Mich. 425: "Of the power of the common council to pass the ordinances in question we have no doubt. They contravene no provision of the constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city."

It is provided in section 3155 of the Revised Statutes of 1881, being <sup>55</sup> section 3616, Burns' Revision, 1894, that "the common council shall have power to make other by-laws and ordinances not inconsistent with the laws of the state, and necessary to carry out the objects of the corporation."

We think the ordinance in question violated no provision of the constitution or laws of this state, and that without any



charter provision the ordinance would be a valid act based upon an inherent right.

We are aware that the doctrine of inherent right is disputed in some of the states, as appears by the following authorities: *State v. Schuchardt*, 42 La. Ann. 49; *Kneedler v. Norristown*, 100 Pa. St. 368; 45 Am. Rep. 383; *City of Des Moines v. Gilchrist*, 67 Iowa, 210; 56 Am. Rep. 341; *Pye v. Peterson*, 45 Tex. 312; 23 Am. Rep. 608.

But, in 15 American and English Encyclopedia of Law, page 1170, it is said: "The decided weight of authority in this country is that municipal corporations have the power, under the general welfare clauses usually contained in their charters, without express legislative grant, to establish fire limits, forbidding the erection of wooden buildings," etc.

To support this doctrine the author cites a great number of decisions, and, in note 1, says: "These cases all rest on solid principle, for the rule has always been that a municipal corporation has the inherent power to enact ordinances for the protection of the property of its citizens against fire." Citing the cases (among others): *Clark v. City of South Bend*, 85 Ind. 276; 44 Am. Rep. 13; *Baumgartner v. Hasty*, 100 Ind. 575; 50 Am. Rep. 830; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; Kent's Commentaries, 339.

The remaining question to be considered is, Was there an erection of a building, or a removal thereof, within the meaning of the ordinance?

In some of the states the removal of a building and <sup>50</sup> locating the same upon another spot is held to be an "erection": *Wadleigh v. Gilman*, 12 Me. 403; 28 Am. Dec. 188.

Also, "to enlarge or elevate a wooden building so as to alter its character is an erection of such building within the meaning of the ordinance": *Douglass v. Commonwealth*, 2 Rawle, 262.

In Connecticut, however, a removal taking place wholly within the fire limits is not such "erection": *Daggett v. State*, 4 Conn. 60; 10 Am. Dec. 100; *Booth v. State*, 4 Conn. 65; *Tuttle v. State*, 4 Conn. 68; *State v. Brown*, 16 Conn. 54; *Brown v. Hunn*, 27 Conn. 332; 71 Am. Dec. 71.

The word "erect" is defined, in Anderson's Law Dictionary, page 410: "To lift up, build, construct; as to erect a building, a fixture." "Removing a building is not erecting it; nor is elevating or materially changing it."

The weight of authorities support the position held by the courts of Connecticut on this question.

It is insisted by the appellee that, as the act threatening does not contemplate the taking of the house from the lot it occupies, it would not constitute a removal within the meaning of the ordinance.

Webster defines the word "remove" to be: "To move away from the position occupied; to cause to change place; to displace; as, to remove a building."

Of course the removal must be a substantial one. The mere turning of a building, or the change of the foundation so as to permit the erection of a bay window, would hardly come within the rule. But the fact that the structure is not to be taken from the lot upon which it was originally built, or where it stands, cannot be the criterion. The word "lot" contains no legal or other meaning as to quantity, except it is a distinct portion of land, usually smaller than a field. It is such part as the owner may fix in his plat. It may be large or small. A man might move his house over considerable space <sup>57</sup> and still leave it on his lot. If the house were taken from one man's land and located on another's there can be no doubt it would be a removal, and yet, the test is not that by the contemplated change the house is to be set in a particular spot or position.

The allegation is that the appellee was about to remove it twenty feet nearer appellant's land and within ten feet of his house. That assertion is admitted, by the demurrer, to be true. This court cannot say, as a matter of law, that a removal of twenty feet is not a substantial removal of the house. If it was not a removal, the facts showing that it was a mere change should have been stated by way of answer.

The language of the complaint is "That defendant is about to remove the said frame building upon his lot and relocate the same within said [fire] limits, twenty feet nearer the plaintiff's house and within four feet from plaintiff's property, and ten feet from plaintiff's frame house," etc.

It will be thus seen that the charge is that defendant is about to remove and relocate the entire building. The expression used negatives the idea that the mere form of the building was to be changed, and conclusively shows that the intended change materially increases the risk and danger from fire to plaintiff's building, and also increases the rate of insurance. It is true a removal of twenty feet is not a great one, but if the appellee can evade the provisions of the ordinance by removing his house and relocating it twenty feet

away from its former location, on like reasoning, why not two hundred or two thousand feet?

If appellee had sold part of his lot, and the purchaser had desired to buy and remove the house in question twenty feet nearer plaintiff, and relocate it upon the part of the lot so purchased, would anybody contend it would <sup>be</sup> not constitute a removal? We think it can make no difference as to whom the property upon which it is to be removed and relocated belongs. When the common council of the city defined the fire limits it is presumed they did so with reference to the exact location of all the buildings within the limits.

In our opinion the court erred in sustaining the demurrer to the complaint.

For this error the judgment of the court below is reversed, and the cause remanded, with instructions to overrule said demurrer.

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**NUISANCES—INJUNCTION AGAINST AT REQUEST OF PRIVATE PERSON.**—A private person may seek relief by injunction against a nuisance which works a special and peculiar injury to him: *First Nat. Bank v. Sarilla*, 129 Ind. 201; 28 Am. St. Rep. 185, and note, with the cases collected. See, also, the extended note to *Creighton v. Dahmer*, 35 Am. St. Rep. 673.

**MUNICIPAL CORPORATIONS—POWER TO ESTABLISH FIRE LIMITS.**—Under a power to make regulations for guarding against damage by fire, a city may establish fire limits and forbid the erection of wooden buildings within them: *Charleston v. Reed*, 27 W. Va. 681; 55 Am. Rep. 336, and note. To the same effect, see *Klingler v. Bickel*, 117 Pa. St. 326; *McCloskey v. Kreling*, 76 Cal. 511, and *Ford v. Thrallkill*, 84 Ga. 169; but in *State v. Schuchardt*, 42 La. Ann. 49, it was held that a city could not establish fire limits without express legislative authority. The cases discussing this subject will be found in the notes to *First Nat. Bank v. Sarilla*, 28 Am. St. Rep. 198, and *Mayor v. Hoffman*, 29 Am. Rep. 347.

**MUNICIPAL CORPORATIONS.—A CITY COUNCIL HAS POWER TO PERMIT THE REMOVAL OF WOODEN BUILDINGS within the fire limits:** *State v. City of Kearney*, 25 Neb. 262; 13 Am. St. Rep. 493.

by the owners in common for the support of their respective buildings. In such cases the rule seems to be that in the absence of express agreement there can be, by implication, no mutual easement of perpetual support applicable to future structures: *Sherred v. Cisco*, 4 Sand. 480; *Partridge v. Gilbert*, 15 N. Y. 601; 69 Am. Dec. 632; *Pierce v. Dyer*, 109 Mass. 374; 12 Am. Rep. 716; *Antomarchi v. Russell*, 63 Ala. 356; 35 Am. Rep. 40; *Hoffman v. Kuhn*, 57 Miss. 746; 84 Am. Rep. 491; *Heartt v. Kruger*, 121 N. Y. 386; 18 Am. St. Rep. 829.

But the right of the appellants possesses none of the elements of mutuality. It is wholly beneficial to the appellants.

The record does not contain the evidence, and we are not advised as to the exact wording of the reservations by which the alleged easement was created. We only learn from the special finding that there was reserved from the appellee "such a right of way over the front and rear stairs" and in the hall "as might be necessary to the proper use and occupancy of the upper story" of the appellants' building.

The parties, in their argument of this case, have treated this reservation as creating an easement, and have endeavored to discriminate between its effect as constituting an easement which fastens itself upon and creates an interest in the realty, and one which operates as a mere license not revocable but extinguishable. To our minds there can be no right to be known as an easement which does not consist of an interest in real estate, and it is difficult, if not impossible, to conceive of an easement becoming extinguished, not by the act of the parties, but by the destruction of a part of the servient estate, when there is that remaining upon which the dominant estate may operate in whole or in part.

The essential qualities of easements are these:

1. They are incorporeal; <sup>204</sup> 2. They are imposed on corporeal property; 3. They confer no right to a participation in the profits arising from such property; 4. They are imposed for the benefit of corporeal property; 5. There must be two distinct tenements—the dominant, to which the right belongs, and the servient, upon which the obligation rests: 6 Am. & Eng. Ency. of Law, 142, and authorities there cited.

Possessing these elements and constituting an easement creates an interest in land: 6 Am. & Eng. Ency. of Law, 143; *Robinson v. Thrailkill*, 110 Ind. 117; *Branson v. Studabaker*, 133 Ind. 147.

It is only by reason of this character of the interest that an action to quiet title to an easement is entertained under our practice. Therefore, to conclude that the appellants held no interest in the real estate is to hold that they had no easement. If the right were but a license, the fact of destruction is not essential, since the denial of the right by the appellee works a revocation, there being no such right as a license not subject to revocation and falling short of an easement.

We feel entirely certain that the reservation, in the form in which it was brought to us, was not intended to create an interest in the soil, and if it possessed the qualities of an easement, in that it became an interest in real estate, it was only to the extent of affording the use of the stairways and hall in the building as it existed, and independently of any right to or interest in the soil. If this was the extent of the interest, it follows that the destruction of the building destroyed the right as effectually as if the interest had been in the soil, and the floods had carried away the soil—nothing would remain upon which the right could operate. A new structure would not re-create the right, for such right <sup>205</sup> had been destroyed and not simply suspended, as would probably have been the case if the right had attached to the land.

The case of *Hahn v. Baker Lodge etc.*, 21 Or. 30, 28 Am. St. Rep. 723, presents a stronger claim to a reviving right than that of the appellants. There the plaintiff owned a lot upon which was erected a two-story building, the middle room or hall in the upper story of which was owned by the defendant, and used as a lodge. The building was destroyed by fire. The conveyance to the defendant contained no provision, in case of such destruction, giving the right to rebuild. No interest in the land having been conveyed, it was held that all right was extinguished. We say the claim was stronger because there the interest was an absolute ownership; here, at most, it is but an easement, and in neither case does it appear that the right extends to the subjacent soil. The distinction here marked was established by this court in the case of *Thorn v. Wilson*, 110 Ind. 325; 59 Am. Rep. 209. It was there held that a contract under which one became the owner of an upper story of a building gave no interest in the land. It was said: "The instrument before us, however, grants a mere use, and not a proprietary interest in the *corpus* of the property, and upon such a grant a proprietary interest in the real estate itself cannot be recovered." It

was also suggested that in case of the destruction of the building all rights under the contract would terminate.

We conclude, therefore, that the right of the appellants did not extend beyond the use of the stairways and halls, and did not consist of an interest in the soil; that no obligation rested upon the appellee to rebuild or maintain for appellant's use another stairway in the event of the destruction of those in which the interest was held, and that by the destruction of the buildings, <sup>200</sup> without the fault of the appellee, the interest of the appellant was extinguished.

The judgment of the lower court is affirmed.

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**LICENSE—INTEREST OF LICENSEE.**—A written agreement that one may construct a second story on another's building and "have and own said second story" for his use perpetually, confers no interest in the freehold: *Thorn v. Wilson*, 110 Ind. 325; 59 Am. Rep. 209.

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## NEVERS v. HACK.

[138 INDIANA, 200.]

**FRAUDULENT CONVEYANCES—ALLEGATIONS AND PROOF.**—To avoid a fraudulent conveyance it must be both alleged and proved that at its execution and also when the suit was brought the debtor did not have sufficient property, subject to execution, to pay his debts.

**FRAUDULENT CONVEYANCES—PRESUMPTION.**—Insolvency of the debtor at the time the suit is brought to set aside his conveyance as fraudulent does not carry with it the presumption that such insolvency existed prior to that time, and extended back to the time when the conveyance was made.

*C. N. Morton*, for the appellant.

<sup>200</sup> **MCCABE, J.** The appellant, as a creditor of the appellee Angeline Hack, sued her and her co-appellees John M. Hack and Joseph L. Hack, to set aside an alleged fraudulent conveyance to each of the two latter, by said Angeline, and subject the real estate so conveyed to satisfy appellant's debt. Issues were formed, on which a trial resulted in a finding and judgment in favor of appellees that appellant take nothing by his suit and for costs.

The action of the court in overruling appellant's motion for a new trial is assigned for error, and is the only error complained of here. The only grounds assigned therefor in the motion for a new trial are that the finding is not sustained by sufficient evidence, and is contrary to law.

It appears from the evidence that the alleged fraudulent conveyances were made on the seventh day of October, 1891, and that appellant recovered a judgment against <sup>261</sup> said Angeline February 19, 1892, for \$2,637.50, on two promissory notes for \$1,200 each, executed by said Angeline with another on March 1, 1890, each due one year after date.

An execution issued on said judgment March 17, 1892, was returned June 3, 1892, showing a sale of property of said Angeline for \$200 on said writ, and that the sheriff could find no other property, either real or personal, belonging to her and subject to execution. Of the money returned, \$164.85, the balance of the \$200 left after the payment of costs, was applied on the judgment. Another execution was issued July 14, 1892, and was returned August 13, 1892, by the sheriff, in which return he states that he demanded property of said Angeline, and she thereupon presented a schedule of her property and demanded that the same be set apart to her as exempt from levy and sale; that he caused the property to be appraised, showing its value to be \$430, and the return then states "which schedule and appraisement are returned herewith and made a part hereof. I therefore return this writ not satisfied." This suit was begun on the fifteenth day of August, 1892.

There was no evidence to establish the insolvency of the appellee Angeline, at any time, other than the two returns of the two executions already set forth. It is the settled law in this state that it must be both alleged and proven before an alleged fraudulent conveyance can be avoided, that, at the time of the conveyance, and at the time the suit is brought, the debtor did not have enough property left, subject to execution, to pay his debts: *Pence v. Croan*, 51 Ind. 336; *Sherman v. Hogland*, 54 Ind. 578; *Evans v. Hamilton*, 56 Ind. 84; *Bentley v. Dunkle*, 57 Ind. 374; *Romine v. Romine*, 59 Ind. 346; *Deutsch v. Korsmeier*, 59 Ind. 373; *Price v. Sanders*, 60 Ind. 310; *Whitesel v. Hiney*, 62 Ind. 168; *Spaulding v. <sup>262</sup> Myers*, 64 Ind. 264; *Noble v. Hines*, 72 Ind. 12; *Bruker v. Kelsey*, 72 Ind. 51, and many other cases too numerous to cite.

Counsel for appellant concedes this to be the law in this state, but contends that if the insolvency of the debtor be established or proven to exist at the time the suit is brought to avoid the conveyance, that carries with it the presumption that such insolvency existed prior to that time, and extends

back to the time when the conveyance was made, and cites in support of that proposition *Lee v. Lee*, 77 Ind. 251.

That case, and perhaps some others, among which are *Braker v. Kelsey*, 52 Ind. 51, and cases there cited, hold that a return of an execution *nulla bona* shortly before the suit is brought may be sufficient *prima facie* to prove that the grantor did not have property at the time the suit is brought, subject to execution, sufficient to pay his debts. But none of them holds that such return is sufficient to prove that he did not have such sufficient property at the time the conveyance was made.

In support of the contention that such return is sufficient we are referred to *Strong v. Lawrence*, 58 Iowa, 55, and *Carlisle v. Rich*, 8 N. H. 44, both of which hold that "where it is found that a debtor is insolvent at the time the judgment is rendered, and is unable to respond to the amount recovered, his insolvency will be considered as extending back beyond a voluntary conveyance of his property made during his indebtedness, unless the contrary is shown."

This doctrine virtually puts the burden of proof upon the wrong party. It, in effect, amounts to saying to a party charged with a fraudulent conveyance, you must prove yourself innocent before the party preferring the charge is required to prove any thing. The first case last above named further says: "The party who sets up a <sup>263</sup> voluntary conveyance in opposition to the claims of pre-existing creditors is required to show that the means of the donor, independent of the property conveyed, were abundantly ample to satisfy all his creditors." This doctrine prevails in some of the states, but never has in this state.

This court was asked in *Sell v. Bailey*, 119 Ind. 51, to overrule all the Indiana cases, and adopt this doctrine. It was there said: "The principle which our cases assert, and in various phases apply, is substantially that asserted in *Rice v. Perry*, 61 Me. 145, where it was said: "A fraudulent purpose is an important element in the case, but it is not the only one; there must be superadded to it, in addition to the sale, actual fraud, hinderance, or delay resulting therefrom to the creditors. . . . This is a rule of pleading as well as of evidence. Hence, a bill which contained no allegations that the debtor, at the time of the alienation, was insolvent or embarrassed, was held bad, for it is only when an inadequate amount of property remains that creditors have the



right to complain. . . . We adhere to our decisions, upon the principle of *stare decisis*, but also for the . . . they justly express the law."

case of *Hartlepp v. Whiteley*, 129 Ind. 576, was reversed because the special finding failed to state that the grantor had no other property than the land, either at the time of the conveyance or from that time to the time suit was brought. The same case is re-reported in 131 Ind. 543.

To the same effect are *Line v. State*, 131 Ind. 468; *Winstandley v. Stipp*, 132 Ind. 548; *McConnell v. Citizens' State Bank etc.*, 130 Ind. 127.

The precise point contended for by appellant, and on which his appeal depends, was ruled against him in <sup>384</sup> *Petree v. Brotherton*, 133 Ind. 692, wherein, at page 694, it is said: "It is also averred that the plaintiff caused an execution to issue on his judgment to the sheriff, and the same was returned, 'no property found to satisfy the same or any part thereof.' . . . The statement that he did not have the property subject to execution at the time the action was commenced, or at the time an execution was issued and returned, is not a sufficient compliance with the well-established rule of pleading in such actions."

It is a general rule of evidence that the *allegata et probata* must correspond; that is, the proof must "at least be sufficiently extensive to cover all the essential allegations of the pleading: 1 Greenleaf on Evidence, sec. 51; *The Brig Sarah Ann*, 2 Sumn. 206.

Tested by this rule the evidence in this case was not sufficient, and fell short of supporting the complaint. There was no conflict in the evidence, the appellees not having offered any, of any kind, on the trial. We are entirely without the aid of any brief on the part of the appellees. It is to be regretted that no rule of this court has ever been formulated by which the consequences of such serious dereliction of duty on the part of one securing the judgment of the trial court in his favor can be visited upon him in this court.

An appellee does this court and himself great injustice in throwing the burden on the court of hunting up the authorities that support the conclusions of the trial court, where the authorities afford such support.

There was no error in overruling the motion for a new trial. The judgment is affirmed.

**FRAUDULENT CONVEYANCES—SETTING ASIDE—PLEADING.**—A complaint in an action by a judgment creditor, who is also the execution purchaser, to quiet title and to set aside a fraudulent conveyance of the lands made by the judgment debtor, which fails to aver that the latter had no other property subject to execution at the time the fraudulent conveyance was made, is fatally defective: *Wagner v. Law*, 3 Wash. 500; 28 Am. St. Rep. 56.

## MEADOR v. LAKE SHORE AND SOUTHERN MICHIGAN RAILWAY COMPANY.

[138 INDIANA, 290.]

**APPEAL.—ASSIGNMENT OF ERROR** that "the court erred in taking the case from the jury" is not a proper specification of error and presents no question for consideration on appeal.

**MASTER AND SERVANT—MACHINERY AND APPLIANCES.**—It is the duty of the master to the servant to furnish sufficient, properly constructed, and safe machinery, or other materials or appliances, to be used by the servant in the course of his employment and necessary for the service.

**MASTER AND SERVANT—MACHINERY AND APPLIANCES.**—If the servant has equal knowledge with the master as to the machinery used, or means employed in the performance of the work he is required to do, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof.

**MASTER AND SERVANT—DANGEROUS MACHINERY—PROMISE TO REPAIR.**—If a servant is engaged in a dangerous service in which the machinery is defective, and has knowledge thereof, makes objection thereto, and is induced to remain in the master's employment, by promise or assurance of its repair, and, not having waived the objection, is injured by reason of such defect, without contributory negligence on his part, he is entitled to recover. But greater care is required of him than if he had not known of the defect.

**MASTER AND SERVANT—DEFECTIVE MACHINERY AND APPLIANCES—LIABILITY OF MASTER.**—If a servant is employed in the performance of ordinary labor, in which no machinery is used, or materials furnished, the use of which requires the exercise of great skill and care, the fact that a defective instrument or tool is furnished by the master, of which the servant has full knowledge and comprehension, does not render the master liable in case of injury to the servant caused by the use of such instrument.

**MASTER AND SERVANT—DEFECTIVE APPLIANCES—RISKS ASSUMED BY SERVANT.**—If a servant whose duties require him to use a ladder, upon discovering that it is defective and dangerous, notifies the master, who promises to furnish another, and directs the servant to use the old one until a new one is furnished, the servant assumes the risk in again using the old ladder, and cannot recover of the master for an injury sustained by its use, although the service in which it is used is of a kind that cannot be postponed.

*H. C. Dodge*, for the appellant.

*F. E. Baker and C. W. Miller*, for the appellee.

<sup>290</sup> DAILEY, J. This was an action by the appellant against the appellee for damages for personal injuries, stated in a complaint in one paragraph.

The allegations therein summarized are as follows: The appellant was an employee of the defendant, and a part of his duty was to light and extinguish lamps at a street crossing, the lamps being put on top of a post eight or eight and one-half feet high, requiring a ladder to be used by appellant to perform that duty; that appellee furnished the ladder; that it got out of repair; that Christian Jacobson was the agent of appellee, who was intrusted with the duty of furnishing for appellee all ladders and other appliances, which were made in appellee's carpenter-shop at Elkhart station; that appellant notified said Jacobson that said ladder was becoming weakened and out of repair, and was not suitable for the <sup>291</sup> use which appellant was required to make of it; that said Jacobson told the appellant the ladder would be safe until he, Jacobson, could furnish a new one, and he would furnish a new one very soon; that appellant's other duties were performed without the use of the ladder, and were at a different place; that appellant relied upon the statement of Jacobson that said new ladder would be furnished at the place the ladder was to be used; that when he went to use the ladder he found that no new ladder had been furnished according to promise; that the service in which the ladder was used was of a kind which could not be postponed; that he carefully examined the old ladder and could not see any new evidence of its giving away, and in the belief that said Jacobson knew whether it was safe to use, when he told appellant to continue to use it until a new one was furnished, and relying upon said Jacobson's directions and knowledge, he carefully, and without any negligence, used the ladder again, upon which use it gave away and threw him upon the ground and injured him; that he would not have used said ladder but for the directions of said Jacobson and his promise to supply a new one; that the defective condition of said ladder was wholly because of the negligence of the appellee, and not contributed to by the appellant.

The appellee demurred to the complaint, and the demur-

rer was overruled. The case was then put at issue by a general denial.

At the trial the court instructed the jury as follows: "Gentlemen of the jury, the court instructs you to find a verdict for the defendant. J. M. VAN FLEET, Judge.

To the giving of this instruction the appellant at the time excepted. The jury obeyed the instruction, and returned their verdict for the defendant. Final judgment was rendered upon the verdict. Appellant filed a motion <sup>292</sup> for a new trial, which was overruled, and exceptions taken.

The appellant assigns two errors, as follows:

1. The court erred in overruling appellant's motion for a new trial; 2. The court erred in taking the case from the jury.

The second specification is not a proper assignment of error, and presents no question for our consideration. The real question to be considered is, Did the court err in overruling appellant's motion for a new trial?

It appears that the appellant was a man of mature years, and of average mental and physical capacity. It was his duty, under his employment, to light and extinguish lamps placed on posts, the distance from the ground to the burner being from eight to eight and one-half feet. In doing this he used a ladder furnished for the purpose, about five feet long, containing five steps, including the top piece, four steps being nailed between and to the sides, and the last step on top of the uprights or side-pieces. By setting the ladder against the post appellant would climb only upon the third step to bring his head even with or above the lamp. The defects alleged to have existed in the ladder, at and before the accident and injury complained of, consisted in the steps not being nailed in tight enough at the sides. On the morning when the injury occurred, if the nails were partially withdrawn from the boards, that was open to observation, and could have been readily seen. Such must have been the condition of the ladder at the time, for it "fell apart." If a hammer or hatchet was not convenient, a stone or a brick would have remedied the defect. No contrivance could be simpler in its construction than this five-foot ladder—not even a hoe, an axe, or a spade. Appellant had at least equal knowledge <sup>293</sup> with the company as to the nature and condition of the ladder.

The right of the plaintiff to maintain this action is founded

upon the negligence of the defendant in not furnishing a proper ladder for the use of the plaintiff in the work he was engaged to perform. It rests upon the principle that it is the duty of the master to the servant, and the implied contract between them, that the master shall furnish sufficient, properly constructed, and safe machinery, or other materials and appliances to be used in the course of his employment and necessary for the service. As a general rule, it may be assumed that the master, who employs a servant, has a better and more comprehensive knowledge of the machinery and materials to be used than the employee, who has claims for his protection against the use of defective, inadequate, or improper machinery, materials, or appliances, while engaged in the performance of the service required of him. The rule stated, however, is not applicable in all cases; where the servant has equal knowledge with the master as to the machinery used or the means employed in the performance of the work he is required to perform, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof.

In considering the application of this rule due regard must be had to the limited knowledge of the employee, to the machinery and structure on which it is employed, also to his capacity and intelligence, and to the fact that the servant has a right to rely upon the master to protect him from danger and injury, and in selecting the agent from which it may arise.

In cases in which persons are engaged in a dangerous service it has been many times held that, if the machinery was defective and the plaintiff had knowledge of it, <sup>294</sup> and made objection thereto, and was induced to remain in the defendant's employment by promise or assurance of its repair, and, not having waived the objection, was injured by reason of such defect, and he did not contribute to the injury by his own fault or negligence, he will be entitled to recover; but, in such case, greater care will be required of him than if he had not known of the defect.

In cases, however, where persons are employed in the performance of ordinary labor, in which no machinery is used, and no materials are furnished, the use of which requires the exercise of great care and skill, it can be scarcely claimed that a defective instrument or tool furnished by the master, of which the employee has full knowledge and comprehen-

sion, can be regarded as making out a case of liability within the rule laid down. A common laborer who uses agricultural implements while at work upon a farm or in a garden, or one who is employed in any service not requiring great skill and judgment, and who uses the ordinary tools employed in such work, to which he is accustomed, and in regard to which he has complete knowledge, cannot be said to have a claim against his employer for negligence, if, in using a utensil which he knows to be defective, he is accidentally injured.

In such case it does not rest with the servant to say that the master has superior knowledge, and has thereby imposed upon him. He fully understood that the spade, the axe, the hoe, or the ladder, the instrument which he used, was not perfect, and if he was thereby injured it was by reason of his own fault and negligence. The fact that he notified the master of the defect, and asked for another implement, and the master promised to furnish it, in such a case, does not render the master responsible if an accident occurs. A rule imposing a <sup>395</sup> liability under such circumstances would be far reaching in its consequences, and would extend the rule of *respondet superior* to many of the vocations in life for which it was never intended. It is a just and salutary rule, designed for the benefit of employees engaged in work where machinery and materials are used of which they can have little knowledge, and not for those engaged in ordinary labor, which only requires the use of implements with which they are entirely familiar. The plaintiff, in the case at bar, was of the latter class of laborers, and the work in which he was engaged was not of a character which would entitle him to the protection of the principle referred to, as applied to the use of complicated machinery: *Marsh v. Chickering*, 101 N. Y. 396. Of this case it is said, in citing and approving it in *Jenney Electric Light etc. Co. v. Murphy*, 115 Ind. 566 (570): "In *Marsh v. Chickering*, 101 N. Y. 396, which grew out of a claim for damages resulting from the slipping of a ladder, a judgment of the lower court for the plaintiff was reversed, notwithstanding it appeared that the plaintiff had notified the employer of the defective condition of the ladder, and the latter had promised to have it repaired. The case is not distinguishable in principle from the one now under review." The case of *Corcoran v. Milwaukee Gas Light Co.*, 81 Wis. 191, is quite similar in its facts. In it the plaintiff notified the defendant that the ladder was not safe and secure, the defend-

ant promised to provide a safe ladder, the plaintiff relied on such promise, the defendant failed to furnish a safe ladder, and ordered the plaintiff to use the old one on the occasion of his injury. It was to be used upon an oily floor and was unsuitable and unsafe for the reason of not having spikes at the bottom. The court said: "The natural, if not the inevitable, result of such an attempt, under such circumstances, is ~~too~~ too obvious not to be anticipated by the exercise of ordinary care on the part of a man of plaintiff's admitted experience. It is unlike the exposure to some concealed or unforeseen danger, or to a defect or danger which the injured party could not be required or expected to remedy." Undoubtedly the result of climbing a five-foot step-ladder, with the cleats gone from under the steps, which they supported, and the nails loose in the side-pieces, is just as obvious as going upon a ladder with no spikes in the bottom, placed upon an oily floor. The court further said: "Besides as indicated in *Marsh v. Chickering*, 101 N. Y. 396, the rule (that the plaintiff might rely on the promise of the defendant to furnish a new ladder), is hardly applicable to a case like the one at bar." In both the cases from which we have quoted the employee was ordered by his foreman to use the defective ladder on the occasion of the injury; while in this case, on the occasion of the accident, appellant was left to decide the time and manner in which he would use the ladder or whether he would use it at all. The conclusion we have reached renders it unnecessary that we should consider the questions raised by the appellant concerning the rejection of certain offered testimony tending to show notice to the company of the defective condition of the ladder; that a notice was posted upon the door of the carpenter-shop at Elkhart instructing persons to whom they should go for new work and repairs; also, that a new ladder was made by Jacobson and brought to the place of the accident on the same day after the injury. We are of the opinion that there is no available error in the record.

The judgment is therefore affirmed.

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**MASTER AND SERVANT—DEFECTIVE APPLIANCES—KNOWLEDGE OF SERVANT.**—If a servant is injured through defects in the machinery or appliances furnished by his master and used in the business the servant cannot recover if he knew or had means of knowledge equal to that of the master concerning such defects and yet continued in the service, provided no inducement such as a promise to cure the defect leads him to so continue:

*Victor Coal Co. v. Muir*, 20 Col. 320; *ante*, p. 299, and note. See, also, the cases collected in the note to *Harker v. Burlington etc. Ry. Co.*, 45 Am. St. Rep. 248.

**MASTER AND SERVANT—DEFECTIVE APPLIANCES—PROMISE TO REPAIR—ASSUMPTION OF RISKS.**—If a servant having the right to abandon the service as dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is imperative and the master is not in the exercise of ordinary care, unless, or until he makes his assurances good, and the servant, by continuing in the employment, does not agree to assume its risks: *Cheaney v. Ocean S. S. Co.*, 92 Ga. 726; 44 Am. St. Rep. 113, and especially note.

## CHAMPER v. CITY OF GREENCASTLE.

[138 INDIANA, 339.]

**MUNICIPAL CORPORATIONS HAVE SUCH POWERS ONLY** as are conferred by the statute creating them, and such incidental powers as are implied by and essential to the accomplishment of the purposes of their creation, and for their continued existence.

**MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.**—A municipal ordinance must be reasonable to be valid.

**THE REASONABLENESS OF A MUNICIPAL ORDINANCE IS A PROPER SUBJECT FOR JUDICIAL INQUIRY**, if enacted under a general grant of authority, not prescribing the manner of its exercise.

**MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS—JUDICIAL INQUIRY.**—An ordinance passed under a general grant of power to regulate places where intoxicating liquors are sold to be used on the premises, without prescribing the particular manner in which such power is to be exercised, is open to judicial inquiry as to whether it is reasonable and valid, or unreasonable and void.

**THE POLICE POWER OF THE STATE IS ITS RIGHT TO PRESCRIBE REGULATIONS** for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of the organic law. This power resides in the state in its sovereign capacity, and can only be possessed and exercised by a municipal corporation by a delegation thereof thereto by the lawmaking power of the state.

**MUNICIPAL CORPORATIONS—ORDINANCES PROHIBITING SCREENS IN FRONT OF SALOONS.**—A municipal ordinance forbidding the erection or maintenance of door-screens, window-blinds, stained, ground, colored, or darkened glass to the doors, windows, or openings of any saloon or place where intoxicating liquors are sold to be used on the premises, or the erection or maintenance of any obstruction of any kind whatever of such doors, windows, or openings, that will obscure or prevent a full view of the interior of such saloon or place, and providing that such ordinance is not to be so construed as to prevent such saloonkeepers and other persons from having the usual and ordinary shutters to their doors, if passed under a general authority granted to license and regulate saloons without prescribing the mode of its exercise, is unreasonable and void.



*C. C. Matson and P. O. Colliver, for the appellant.*

*T. T. Moore, for the appellee.*

<sup>240</sup> McCABE, C. J. This was a suit by the appellee against the appellant, begun in the mayor's court of said city, to recover the penalty provided for the violation of an ordinance of said city. Appellee recovered judgment, from which appellant appealed to the circuit court, where appellant's demurrer to the complaint, for want of sufficient facts, and his motion to dismiss the cause, were both overruled, after which appellee again recovered judgment. Appellant assigns for error these rulings of the trial court, and that the complaint does not state facts sufficient.

The whole question, thus raised, turns upon the validity of an ordinance of said city, which reads as follows: "An ordinance to provide for the removal of all saloon-screens and window-blinds, and providing penalty for the violation of such ordinance. Whereas it is claimed that there have been frequent violations of the liquor law in the city of Greencastle, Indiana, by the saloonkeepers of said city in selling intoxicating liquors to minors and intoxicated persons, and also in allowing minors to congregate in such saloons around the pool-table and billiard-tables kept therein; and, whereas, it has been found difficult, if not impossible, to obtain the evidence necessary to secure a conviction for such violations of law, owing to the blinds and screens erected and maintained by such saloonkeepers to the doors and windows of such saloons, so as to obscure and prevent a view of the interior thereof; therefore, for the better policing of said city, and the more perfect enforcement of law, be it ordained by the common council of the city of Greencastle, Indiana, that it shall be and is hereby made unlawful for any person, or persons, who own, operate, or run any saloon, shop, or other place where intoxicating liquors are sold to be used in and upon the premises within said city of Greencastle, Indiana, or within two miles beyond <sup>241</sup> the corporate limits of said city, to put up, erect, or maintain any door-screens, window-blinds, or stained, ground, colored, or darkened glass of any kind to any of the doors, windows, or openings of such saloon, shop, or other place where intoxicating liquors are sold to be used in and upon the premises, or to put up, erect, or maintain any obstruction of any kind whatever, to any of such doors, windows, or openings, that will in any way obscure or pre-

vent a full view of the interior of such saloon, shop, or place aforesaid, but all such screens, blinds, and stained, ground, darkened, or colored glass, and all other obstructions aforesaid to the doors, windows, and openings of such saloon, shops, and places where intoxicating liquors are sold as aforesaid, shall be taken down and removed, so as to give a full and unobstructed view of the interior of such places at all times: *Provided*, That nothing herein contained shall be so construed as to prevent said saloonkeepers and persons aforesaid from having the usual and ordinary shutters to said doors. Any person violating any of the provisions of this ordinance shall, upon conviction before the mayor of said city, be fined in any sum not less than ten dollars nor more than one hundred dollars for each offense, and each day that such obstruction shall be put up, erected, maintained, or remain in place, shall constitute a separate and distinct offense. This ordinance shall be in force and take effect from and after its passage and publication."

It is contended on behalf of the appellant, that this ordinance is void because it is unreasonable, oppressive, and is in violation of the constitution, because it invades the rights of private property.

The validity of the ordinance depends upon the answer to the question: Had the municipal corporation of Greencastle the power to pass the ordinance? Municipal <sup>342</sup> corporations have such powers only as are conferred upon them by the act of the legislature creating them, and such incidental powers as are implied by their creation and as are essential for the accomplishment of the purposes of their creation and for their continued existence: *City of Lafayette v. Cox*, 5 Ind. 38; *Kyle v. Malin*, 8 Ind. 34.

All acts of such corporations not strictly within these limits are void. Their acts cannot be declared void by the courts because of any supposed conflict between them and the constitution so long as their acts are authorized by the legislature, and the act of the legislature is not in conflict with the constitution.

It is well settled that the creation of a municipal corporation carries with it the implication that such corporation is empowered to pass such ordinances and by-laws as may be needful for its well being: 1 Dillon on Municipal Corporations, 4th ed., secs, 315, 316, and authorities there cited.

It is also well-settled law that, where an ordinance is

passed by such municipality under no other authority than such implied power, the ordinance to be valid must be reasonable; and if it is unreasonable it will be void: 1 Dillon on Municipal Corporations, 4th ed., sec. 319, and authorities cited.

The first question, therefore, that confronts us is whether the passage of the ordinance was a reasonable exercise of the power conferred upon the corporation, and, therefore, whether the corporation had the power to pass it or not. It is to be regretted that counsel on neither side have furnished us with such a discussion of the question as its great importance seems to demand, as it is one of first impression in this court. Therefore, we have gone far beyond the briefs in our investigation, in order to reach a correct solution of the question. At the <sup>342</sup>threshold of this discussion we are met with the suggestion that this court has held in two cases that no inquiry can be made into the reasonableness of the ordinance when the legislature has enacted any thing upon the subject, and hence it is suggested that in such a case the legislature has delegated to cities the power to exercise a discretion in such matters, and, therefore, in such case the courts cannot review that discretion.

The first of the cases referred to is *A Coal-Float v. City of Jeffersonville*, 112 Ind. 15, where it was said: "The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the legislature has enacted nothing on the subject matter of the ordinance, and, consequently, to cases in which the ordinance was passed under the supposed incidental power of the corporation merely," and refers to sections 319 and 328, of 1 Dillon on Municipal Corporations, fourth edition, as authority for that statement. If the quotation is to be construed as meaning that no inquiry in such a case can be made into the question whether the ordinance was a reasonable exercise of the power conferred, then the language is too broad; if, however, it is to be construed to mean that no inquiry can be made as to whether the ordinance is reasonable or not where the power to pass it has been conferred, then it is correct. We think the latter is the proper construction to be placed on the language employed.

Section 328 of 1 Dillon on Municipal Corporations, fourth edition, is the one that relates more directly to the point involved in the above quotation. It reads as follows: "Where

the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded <sup>344</sup> as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid."

This is undoubtedly a correct statement of the law and is amply supported by the adjudicated cases wherever the point has come in question. It affords support to the statement of the rule by the learned judge who wrote the opinion from which we have quoted above only when construed as we have indicated. That was a case in which a recovery in attachment was sought against the boat for wharfage due the city of Jeffersonville. The question arose on the sufficiency of the complaint which set out the ordinance, which provided that "all steamboats, barges, keel-boats, flatboats, or other boats or rafts, coming to or landing at the wharves of said city, shall pay to said city, to wit: . . . For every coal-boat used, etc., \$200 per year payable, etc."

The statute authorizing the enactment of the ordinance is the thirty-fourth subdivision of section 3106 of the Revised Statutes of 1881, which confers on cities the power "To establish and construct wharves, docks, piers, and basins; and to regulate landing-places, and fix the rates of landing, wharfage, and dockage on all public grounds belonging to such city." . . . . This court held in that case, and we think correctly under the statute above quoted, that "cities are expressly authorized . . . to fix rates of wharfage and dockage," and therefore expressly authorized to pass the ordinance above set out. And hence, <sup>345</sup> no question of the reasonableness of the ordinance could arise in that case because the legislature had conferred the authority on the city to pass an ordinance of that specified and defined character, and the section of Dillon cited as above set out, and authori-

ties there cited, as well as the facts, fully warranted the conclusion reached in that case, but neither the case then before the court, nor the authority cited warranted the statement of the abstract proposition quoted, unless construed as we have indicated above. The same question incidentally arose on an appeal to this court from a judgment for a personal injury through negligence of appellant in *Cleveland etc. Ry. Co. v. Harrington*, 131 Ind. 426, where the language above quoted from the Coal-Float case is again quoted. The question there incidentally arose as to the validity of an ordinance limiting the speed of engines and trains within the corporate limits of the city of Indianapolis. This court held that the legislature had expressly conferred the power on the city to pass such an ordinance. Therefore, when this court reached the conclusion, which it correctly did in that case, that, because the legislature had conferred the power to pass the ordinance of the specified and defined character mentioned, it had decided all there was touching that point in the case, and the quotation from the Coal-Float case was unnecessary to the decision; though the enunciation was correct in both of the cases with the construction we have placed upon it.

*Bills v City of Goshen*, 117 Ind. 221, involved the validity of an ordinance requiring, among other things, a license for a roller-skating rink, which provided that the same should be granted upon the payment of such sum as the mayor and common council should determine in each particular case. The fourteenth subdivision of section 3106 of the Revised Statutes of 1881 empowered cities "to regulate <sup>246</sup> and restrain all tables, alleys, machines, devices, or places of any kind for sports or games, kept for hire or pay, . . . if deemed expedient, without a license . . . to be provided for by ordinance." This court held the ordinance invalid because it placed the power to determine the amount of the license fee in each particular case in the mayor and common council instead of fixing the same in the ordinance. This was tantamount to holding that the ordinance was not a reasonable exercise of the power conferred by the statute. *First Nat. Bank etc. v. Sarlls*, 129 Ind. 201, 28 Am. St. Rep. 185, involved the validity of an ordinance making it "unlawful for any person to alter, repair, or rebuild any frame or wooden building within the limits described, when the cost shall equal or exceed three hundred dollars."

After recognizing the principle that cities in this state have

ample power to enact and enforce reasonable ordinances, in the absence of express statutory authority, to secure protection against fire, the statute was referred to, conferring additional power, which authorizes cities "to organize a board of public improvements, and empower such board to grant permits to build houses or additions thereto; to prevent the erection of wooden buildings in such parts of the city as the common council may determine." As applied to repairs, it was held that the ordinance was invalid, because the statute did not empower cities to prevent the repair of wooden buildings in all cases. This is not at variance with the broad language used in the case of *A Coal-Float v. City of Jeffersonville*, 112 Ind. 15, construed as we have indicated. We briefly quote from some of the cases cited in support of the text of section 319, Dillon, cited as authority in the Coal-Float case. In *Haynes v. City of Cape May*, 50 N. J. L. 55, it is said: "There are circumstances under which the court will inquire into the reasonableness of ordinances <sup>347</sup> passed by a municipal body under legislative powers granted to it.

"Those circumstances exist when the powers granted by the legislature are expressed in terms general and indefinite. But where the legislature has defined the delegated powers, and prescribed with precision the penalties that may be imposed, an ordinance within the powers granted, prescribing a penalty within the designated limit, cannot be set aside as unreasonable."

And in another one of those cases it was said: "But the legislature has granted ample power of legislation upon the subject of the erection and use of steam-engines within the city limits, to the mayor and city council of Baltimore, independent of the power 'to prevent and remove nuisances.' They are clothed with the power to pass ordinances 'for the prevention and extinguishment of fires,' for 'securing persons and property from danger or destruction.' . . . It has been well said in reference to such general grants of power that, as to the degree of necessity for municipal legislation on the subjects thus committed to their charge, the mayor and city council are the exclusive judges, while the selection of the means and manner (contributory to the end) of exercising the powers which they may deem requisite to the accomplishment of the objects of which they are made the guardians, is committed to their sound discretion. This discretion is

very broad, but is not absolutely and in all cases beyond judicial control. . . . And while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of opinion there may be a case in which an ordinance passed under grants of power like those we have cited is so clearly unreasonable, so arbitrary, oppressive, or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering <sup>348</sup> and setting it aside as a plain abuse of authority": *Mayor etc. v. Radecke*, 49 Md. 217; 83 Am. Rep. 239.

In another of those cases it is said: "It is contended by the appellees that the town did not have the power to pass the ordinance. It is provided by statute that cities and towns have the power 'to establish and regulate markets; to provide for the measuring or weighing of hay, coal, or any other article for sale.' This statute expressly confers on cities and towns the power to provide for the measuring or weighing of hay, coal, or any other article. The manner in which the power conferred shall be exercised is left to the discretion of the corporation, subject, however, to the general rule that the ordinance must be reasonable": *Davis v. Town of Anita*, 73 Iowa, 325. To the same effect is *Meyers v. Chicago etc. R. R. Co.*, 57 Iowa, 555; 42 Am. Rep. 50, also cited in Dillon.

And in another of those cases the supreme court of California said: "On this subject the rule is this: Where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it <sup>349</sup> will be pronounced invalid": *Ex parte Chin Yan*, 60 Cal. 78.

To the same effect is *Ex parte Frank*, 52 Cal. 608, 28 Am. Rep. 642, and many other cases cited in support of the text of Dillon, *supra*, and elsewhere too numerous even to cite,

and we have been unable to find any case to the contrary, unless the two cases first above referred to in this court are to be so regarded. But, as we have already intimated, we do not think they are to be regarded as against the current of authority, when the language employed in them is construed as we have done, and the cases were both correctly decided on the facts.

But, before we can consider the question whether the ordinance here involved is a reasonable exercise of the powers vested in the corporation, we must inquire what the nature and extent of the powers are that have been conferred by the legislature of this state upon municipal corporations; because if the legislature has conferred the power to pass ordinances of the specified and defined character of the one here in question, according to the principles we have laid down above, then no inquiry can be made as to the reasonableness of the ordinance. In that event we would be limited in our investigation to the single question whether the act of the legislature conferring the power was valid and constitutional or not.

The adjudicated cases cited by the appellee's counsel in support of the validity of the ordinance here in question were cases where the municipalities had been empowered by the legislature of the state of Massachusetts to pass the particular and specified ordinances prohibiting the use of screens in saloons. No power has been conferred by the legislature of this state on municipal corporations to pass ordinances of that particular character; that is, no statute has specified ordinances to prevent the use of screens by saloons as among those that <sup>350</sup> cities are empowered to pass. Hence the cases cited by appellee's counsel are not only not in point here, but their influence is against appellee's contention, if they are entitled to any weight at all, because the enactment of such a statute in Massachusetts is a tacit recognition by the law-making power of that state that municipal corporations there had no power to pass ordinances of that kind without a statute specifically authorizing the same. The statute upon which the claim is based in this case, that the corporation had the power to pass the ordinance here in question empowered cities "To regulate and license all inns, taverns, or other places used or kept for public entertainment; also all shops or other places kept for the sale of articles (liquors) to be used in and upon the premises" (Rev. Stats. 1881, subd.



13, sec. 3106); . . . . "and to regulate all places where intoxicating liquors are sold to be used on the premises": Rev. Stats. 1881, sec. 3154, and the general welfare clause.

It would be difficult to conceive of a more general grant of power. The two subdivisions of the sections referred to are almost as general and indefinite as the general welfare clause. The power to legislate upon a given subject is conferred upon municipal corporations, but the mode of its exercise is not prescribed, and the kind of ordinances that they are empowered to pass is not specified or defined. The legislature has not said here what distinct or particular acts may be done by the corporation. It has not said that municipal corporations may pass ordinances of the kind here involved. If it had, that would end the inquiry. As it has not, by the uniform current of authority, ordinances passed under such a general grant of power must be reasonable, consonant with the general powers and purposes of the corporation, and not inconsistent with the laws or policy of <sup>351</sup> the state; otherwise it is the duty of the courts to declare them void.

We therefore hold that the ordinance here involved is open to the inquiry whether its passage is a reasonable exercise of the power conferred by the legislature. It is strenuously insisted that the corporation, by the police power, is authorized to pass the ordinance in question, whether it is reasonable or unreasonable. The police power of the state, so far, has not received a full and complete definition. It may be said, however, to be the right of the state, or state functionary, to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of the organic law. Of this power it may be said that it is known when and where it begins, but not when and where it terminates. But this power, whatever may be its limits, resides in the state in its sovereign capacity, and can only be possessed and exercised by a municipal corporation by a delegation thereof to the municipality by the lawmaking power of the state: *City of Crawfordsville v. Braden*, 130 Ind. 149; 30 Am. St. Rep. 214; 15 Am. & Eng. Ency. of Law, 1166, 1167, and authorities there cited.

So that at last the validity of the ordinance depends upon whether it is a reasonable exercise of the power conferred or not. It forbids the erection or maintenance of door-screens,

window-blinds, stained, ground, colored, or darkened glass to the doors, windows, or openings of any saloon, shop, or other place where intoxicating liquors are sold to be used on the premises, or the erection or maintenance of any obstruction of any kind whatever, of such doors, windows, or openings, that will obscure or prevent a full view of the interior of such saloon, etc. <sup>§§</sup> *Provided*, That it is not to be so construed as to prevent such saloonkeepers and other persons mentioned from having the usual and ordinary shutters to their doors.

Under this ordinance, if valid, it would make the use of the ordinary door-screen or window-shutters, window-screens, and window-curtains to the doors or windows of a saloon unlawful, and it would likewise make it unlawful to maintain stained, ground, colored, or darkened glass of any kind to any of such doors or windows.

We know of our own knowledge, common alike to all, that the use of door-screens, window-screens, window-shutters, window-curtains and blinds, ground, darkened, and colored glass used in and to doors and windows, are among the comforts and conveniences of civilized life. They are used in other business houses than saloons, in private houses, in public buildings and offices, in hotels and dining-halls, in depots, in courthouses, and in churches. Indeed, it may be said that they are necessary comforts and conveniences of civilized life, almost as much so as houses are to live in, and to do business in. The protection of the occupants of such houses and places against the fierce rays of the sun in the proper use of such houses and places may be almost, if not quite, as necessary as protection against the storm and the rain and the inclemency of the weather generally. It may be admitted that the evils arising from the sale of intoxicants have been so great that it has become the settled policy of the state, from the earliest times, to place and keep the traffic under stringent restrictions by the statutes of the state, and that these evils are often increased by violations of these statutory restrictions by licensed dealers. But we cannot concur in the contention of appellee's counsel that the saloon "business is an illegitimate one, and that in order to make large profits therein it is necessary to constantly violate the law." <sup>§§</sup> The business is one that any one could lawfully engage in, in the absence of any statute on the subject, and the statutes of the state, which from time to time have imposed restrictions and burdens upon the traffic, do not pro-

ceed upon the idea that the business is illegitimate, and seek to legalize an illegitimate business, but proceed upon the idea that the business is legitimate, and, owing to the evils arising from it, seek to place it under restrictions and burdens, so as to lessen those evils.

Be this as it may, there is no reason in saying that because some saloonkeepers violate the law all shall be deprived of the use of the necessary comforts and conveniences of civilized life in their business. If the corporation can make it unlawful for them to use screens to exclude flies and insects, they may make it unlawful for them to use shutters to their doors to exclude the cold, the storm, and the rain; if it can make it unlawful for them to use window-shutters and window blinds and curtains, colored, stained, and ground glass in doors and windows of their saloons, under the pretense of permitting an unobstructed view into the interior of their saloons, the better to detect violations of the liquor law, then there is no reason why they cannot be compelled to make the whole front of their saloons of solid glass, without any wood or any other material. Indeed, if the corporation has the power to make the ordinance here in question, for the reasons given in the preamble thereto, then it necessarily has the power by ordinance to compel them to open the whole front of their saloons, from one side to the other, without even the poor privilege of putting solid glass in as a protection against storm, rain, and the inclemency of the weather, and against theft and robbery.

This court, in *Decker v. Sargeant*, 125 Ind. 404, in holding <sup>354</sup> an ordinance valid forbidding the use of screens by saloonkeepers between 11 o'clock in the evening and 5 o'clock in the morning, recognized the principle that such an ordinance might not be valid when applied to that portion of the day when the saloonkeeper was authorized to sell under his license. There can be no doubt that such an ordinance would be within the power granted, and reasonable if it is confined in its operation to such times as the saloonkeeper is not allowed to do business, as between 11 o'clock at night and 5 o'clock in the morning, on Sundays and legal holidays, and other days on which they are prohibited from doing business.

We are of opinion that the ordinance here involved goes beyond any power conferred upon the common council, either

by express statute or by necessary implication, and is, therefore, void.

The circuit court erred in overruling the demurrer to the complaint.

The judgment is reversed and the cause remanded, with instructions to sustain the demurrer to the complaint.

**MUNICIPAL CORPORATIONS—POWERS GENERALLY.**—The powers of a municipal corporation are confined to those expressly granted, or those essential to the execution of the powers so granted: *South Covington etc. Ry. Co. v. Berry*, 93 Ky. 43; 40 Am. St. Rep. 161, and note; *Phillips v. City of Denver*, 19 Colo. 179; 41 Am. St. Rep. 230, and note.

**MUNICIPAL CORPORATIONS—ORDINANCES—REASONABLENESS.**—Municipal ordinances must be reasonable, not inconsistent with the laws of the state, nor repugnant to fundamental rights: *Anderson v. City of Wellington*, 40 Kan. 173; 10 Am. St. Rep. 175. See the notes to *Mayor v. Dry Dock etc. R. R. Co.*, 28 Am. St. Rep. 614; *People v. Armstrong*, 16 Am. St. Rep. 584, and the extended notes to *Ward v. Mayor*, 35 Am. Rep. 702, and *Robinson v. Mayor*, 34 Am. Dec. 633.

**MUNICIPAL ORDINANCES MAY BE DECLARED VOID BY THE COURTS** if they are unreasonable: *City of Tarkio v. Cook*, 120 Mo. 1; 41 Am. St. Rep. 678.

**MUNICIPAL CORPORATIONS—ORDINANCES REGULATING SALOONS.**—A municipal ordinance requiring the removal from the doors and windows of saloons for the sale of intoxicating liquors of all screens and other obstructions to the view of the interior of, and the business transacted within, such saloon is void as unreasonable, prohibitive of lawful business, and not in the line of regulation: *Steffy v. Monroe City*, 135 Ind. 466; 41 Am. St. Rep. 436.

**POLICE POWER—WHAT IS.**—The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure or tend to the comfort, prosperity, or protection of the community: *People v. Beer*, 141 N. Y. 129; 38 Am. St. Rep. 783, and note, with the cases collected.

## HOLLINGER v. REEME.

[128 INDIANA, 363.]

**JURISDICTION—APPEARANCE.**—Filing a demurrer to a complaint is a full personal appearance to the action.

**JUDGMENTS—SETTING ASIDE FOR FRAUD.**—One who seeks to have a judgment set aside for fraud must show in his application that he has a meritorious defense, which he was without his laches prevented from making; and that he has made his application for relief without delay after the discovery.

**JUDGMENTS—IMPEACHMENT FOR FRAUD.**—A judgment cannot be impeached in a collateral proceeding for fraud or collusion.

**JUDGMENTS—UNAUTHORIZED APPEARANCE OF ATTORNEY—RELIEF.**—The relief to which a defendant is entitled when a judgment against him

has been procured through the unauthorized appearance of an attorney is to have such judgment opened and proceedings therein stayed until a trial can be had on the merits.

**A JUDGMENT OBTAINED BY FRAUD IS BINDING** on the parties until set aside in some direct proceeding.

*M. Hollinger and Mack & Henry*, for the appellant.

*J. G. McNutt and F. A. McNutt*, for the appellees.

<sup>263</sup> DAILEY, J. This was an action by appellant, Hollinger, against the appellees, Reeme, Quackenbush, and Stout, sheriff of Vigo county, to perpetually enjoin the collection of a certain judgment, and to have the same set aside and held for naught. The complaint is as follows: "Plaintiff, complaining, shows the court that on the 29th day of January, 1878, these defendants, Reeme and Quackenbush, filed a complaint in this court, cause number 9917, against this plaintiff and one <sup>264</sup> David R. Stith; that said action was upon a joint obligation purporting to be the joint obligation, not several nor joint and several promise of the said Stith and Hollinger, a copy of said complaint, pleadings and dockets and judgments are made a part hereof, exhibits marked 'A'; that on the 10th day of March, 1880, upon the hearing and trial of said cause, judgment was rendered against said Stith and this plaintiff Hollinger for the sum of \$1,033.33; that on March 16, 1880, the said court, after proper hearing, duly rendered judgment in said cause against said Stith as sole defendant for said sum of \$1,033.33, wholly releasing this plaintiff Hollinger from any liability thereon, and that said judgment duly rendered against said Stith still remains in full force and effect; that on the 12th day of August, 1880, these defendants, Reeme and Quackenbush, having fully abandoned the original claim, No. 9917, brought a separate proceeding in said court against this plaintiff to bind him to, and as a party judgment defendant with said Stith in, the above-recited judgment for \$1,033.33; that this last cause referred to was No. 12127; and, after proper hearing, judgment was awarded against this plaintiff for costs of the proceeding, November 5, 1885, and the cause dismissed, and a copy of said pleadings and record is filed herewith as a part of this marked exhibit 'B'; that cause No. 9917, although fully disposed of by the court and abandoned by said Reeme and Quackenbush March 16, 1880, still remained on the docket of the court, and plaintiff, believing the same was at an end,

left the state in 1881 and removed to the territory of New Mexico, and remained a nonresident of this state until 1887; that no one was authorized to represent him in said cause or to make any agreement for him, and he had no knowledge that said suit was still pending in said court; that, as appears of <sup>see</sup> record in this court, on the 3d day of November, 1885, the defendants herein, Reeme and Quackenbush, or some one in their behalf, fraudulently and without this plaintiff's knowledge or consent, caused a judgment to be entered against this plaintiff and said Stith, as by agreement, for \$150, and costs for \$50, and plaintiff herein says that he had been his own attorney in said cause and had no other; there never was such an agreement made by him, or any one authorized to make such, and that the entry of said judgment was a gross fraud upon him and this court, and that the court made no inquiry into the merits of said cause, and had, such cause been submitted to the court for inquiry, no judgment could have been rendered against him; that plaintiff had no knowledge that said judgment had been rendered against him until about the time of the issuing of an execution on said judgment, which was on or about the 5th of June, 1891. Said execution was issued by the defendants, Reeme and Quackenbush, to the defendant Stout, who is sheriff of this county, who is threatening to levy the same upon the property of this plaintiff in this county. Wherefore, plaintiff prays the court to grant a temporary restraining order until the final hearing of this, and, upon the final hearing of this cause, to grant a perpetual injunction and set aside and hold for naught said judgment."

Appellees demurred to appellant's complaint, which demurrer was sustained by the court, and, appellant refusing to plead further, judgment was rendered in favor of appellees. The error assigned is the sustaining of such demurrer. The only question raised, therefore, is the sufficiency of appellant's complaint. "Exhibit A," as suggested, is the record of the proceedings in cause No. 9917, Vigo circuit court, and such cause is entitled <sup>see</sup> "*Josiah B. Reeme, Augustus L. Quackenbush v. David R. Stith, Martin Hollinger.*"

The complaint in said 9917 shows that Stith and Hollinger executed a note for \$800, with interest, to one Keith, who had assigned the same, before the suit was instituted, to plaintiffs, Reeme and Quackenbush. Action No. 9917 seems

to have been brought previous to February 27, 1878, for on that day it appears that defendants filed answers therein.

Upon issues joined the cause came on for trial on March 8, 1880, and the jury rendered a verdict for the plaintiffs in the sum of \$1,033.33. On March 10, 1880, judgment was rendered on the verdict in favor of the plaintiffs, Reeme and Quackenbush, against the defendants, Stith and Hollinger. Said judgment was set aside on March 16, 1880. On June 8, 1880, the court overruled the motion of the defendants for a new trial, and rendered judgment against Stith alone.

On the same day the record reads: "And comes now defendant Hollinger, and files his demurrer to plaintiff's complaint, and the court, being advised, overruled said demurrer, and the defendant excepts thereto, and is ordered to answer, and a day is given."

It appears the case then lay dormant until November 8, 1885, when the record shows the following entry: "Come again the parties by their attorneys aforesaid, and, this cause being at issue, and coming on for trial, the same is, by agreement, submitted to the court, and by agreement the court finds for the plaintiffs, and assesses their damages at the sum of one hundred and fifty dollars (\$150)."

The judgment for \$150 and costs is the one which the appellant seeks to permanently enjoin and set aside. "Exhibit B" is an exhibit of the record in cause No. 12127 of the Vigo circuit court. The complaint is not <sup>267</sup> a part of it, having been lost, but cause 12127 appears to have been an action to bind Hollinger by the judgment rendered in cause No. 9917, for, upon a trial by the court, a judgment was rendered on June 8, 1881, in cause 12127, declaring Hollinger bound by the judgment in 9917. Such judgment was set aside, however, on January 14, 1882, and on June 7, 1882, Hollinger was granted a new trial.

Cause No. 12127 was finally disposed of as follows: "Come again the parties by their attorneys and, by agreement of the parties, it is ordered that this cause be, and the same is, hereby dismissed at the cost of the defendant."

It is shown by the record that causes 9917 and 12127 were disposed of on the same day, viz., November 8, 1885, and by the agreement of the parties acting by their attorneys. Appellant seeks relief against the judgment in cause 9917 because of an alleged fraud in its procurement; he charges that the judgment plaintiffs, Reeme and Quackenbush, pro-

cured an attorney to appear in his behalf and fraudulently agree to the judgment. While the demurrer to the complaint admits the truth of such allegation, it is proper to bear in mind that the action was upon a promissory note executed by Hollinger for \$800, and that the appellant nowhere denies the execution of this note, nor does he deny that there was ample consideration for the same, nor does he claim that it has been paid in whole or in part.

It seems that as a result of years of litigation a judgment for \$150 was rendered against the appellant, when the original note, executed by him on September 13, 1877, was for \$800. In respect to attacks upon judgments procured by fraud, there are several well-established rules for the guidance of the courts: 1. The person seeking to set aside the judgment <sup>see</sup> must show that he could not have prevented the fraudulent procurement of the judgment by the exercise of reasonable diligence; 2. That he was reasonably diligent in discovering the fraud; 3. That, having discovered the fraud, he proceeded with reasonable diligence to ask such relief as the law affords; 4. He must show that he had a meritorious defense to the action in which the fraudulent judgment was procured, and that the result will probably be different if he is allowed to open up the judgment and defend; 5. If the court had jurisdiction of the subject matter and the parties, and the fraud perpetrated was in the procurement of jurisdiction, he cannot attack such judgment collaterally, but must ask that the judgment be opened up to such an extent only as will allow him to make a meritorious defense.

The appellant has not, by his complaint, brought himself or his defense within any of these rules.

According to the allegations of the complaint, appellant appeared to the action in which the judgment was rendered (No. 9917), for he filed his demurrer to the complaint, which was overruled, whereupon he was ruled to answer. The filing of a demurrer to the complaint has always been recognized as a full personal appearance to the action: 1 Works' Practice, 224; *Knight v. Low*, 15 Ind. 375.

The court, therefore, had jurisdiction of the subject matter and the parties, and, on June 8, 1880 (the day the demurrer was filed), the action was pending in the Vigo circuit court.

Appellant alleges that in 1881 he left the state and removed to New Mexico, and remained a nonresident <sup>see</sup> until 1887; he also alleges that no one was authorized to appear



for him in said action. It thus appears that he deliberately left a pending action from 1881 to November 3, 1885, when the judgment was rendered, with no one looking after his interests. This makes a case of gross negligence. It is true he alleges that the cause was fully disposed of by the court and abandoned by said Reeme and Quackenbush March 16, 1880, but he does not aver in what manner the case was disposed of, or how it had been abandoned; and "Exhibit A" shows that he filed a demurrer to the complaint on June 8, 1880, three months after the alleged disposition and abandonment. He also alleges that he had no knowledge that said suit was still pending, but, in law, it was his business to realize, and he was bound to know it was pending, after he had entered a full appearance. It is also alleged that the appellant had no knowledge of the existence of said judgment rendered November 3, 1885, until June 5, 1891. He returned from New Mexico in 1887, but did not discover the judgment until June, 1891, nearly six years after its rendition, and four years after his return; presumably he had not made inquiry about the case from the time it was rendered up to June, 1891, a period of nearly six years; for the slightest investigation would have disclosed its existence. And, further, it does not appear that he made any inquiry about the pending action from 1881, when he left Indiana, until 1891, when he discovered the judgment. This does not constitute diligence. The existence of the judgment was made manifest to appellant June 5, 1891, and, while the record does not reveal when this action was brought, the first step taken, as shown by the record, was on Monday, May 2, 1892, nearly a year after the discovery of the judgment.

370 "A party who seeks to have a judgment set aside for fraud practiced in obtaining the judgment, must show in his application, that he has a meritorious defense which he was prevented from making; that he was guilty of no laches in failing to prevent or discover the fraud, and that he made his application for relief without delay after the discovery": *Harman v. Moore*, 112 Ind. 221 (227).

"The parties to an action cannot impeach the judgment rendered therein, in any collateral proceeding, on the ground that it was obtained through fraud or collusion. It is their business to see that it is not thus obtained: *Black on Judgments*, sec. 291.

"In order to justify a court in enjoining the enforcement

of a judgment claimed to have been obtained by fraud, mistake, or accident, it is necessary for the complainant to show, in addition to the fraud or mistake relied upon, that it could not have been prevented by the use of reasonable diligence on his part; and that he has been diligent in seeking relief": *Ratliff v. Stretch*, 130 Ind. 282 (285).

"A party who seeks the aid of a court, and asks to be relieved from a judgment obtained against him by fraud, must proceed promptly upon the discovery of the fraud": *Nicholson v. Nicholson*, 118 Ind. 131 (135). Appellant did not use ordinary care to prevent the alleged fraudulent judgment, having left the case pending in 1881, with no one to look after it until 1885, when the judgment was rendered; nor did he exercise diligence to discover it, for the slightest inquiry would have informed him of its existence, which he did not discover for six years; nor does he allege that he made any inquiry at any time. Besides, he was negligent in not bringing the action for relief after the discovery of the judgment until nearly a year after its rendition. It is always necessary, when <sup>271</sup> one seeks to set aside a judgment procured by fraud, to show that there is a meritorious defense to the action in which the judgment was rendered: *Black on Judgments*, secs. 347-349; *Harman v. Moore*, 112 Ind. 227. Not only should it be averred that there is a good defense, but the facts constituting it should be stated and verified by affidavit: *Wilson etc. Co. v. Curry*, 126 Ind. 161; *Goldsberry v. Carter*, 28 Ind. 59 (60); *Frost v. Dodge*, 15 Ind. 139; *Black on Judgments*, sec. 347. As near as the appellant comes to alleging a meritorious defense is the following: "And the court made no inquiry into the merits of said cause, and, had such cause been submitted to the court for inquiry, no judgment could have been rendered against him." This is in the nature of argument, and does not amount to an allegation that appellant had a meritorious defense in cause 9917, wherein the judgment was rendered. He should have stated the facts showing such defense, so that the court could have seen its merits and the injustice of the alleged fraudulent judgment. The appellant does not deny that he executed the \$800 note sued on in cause 9917; he does not deny that there was a valuable and full consideration therefor; nor does he deny that it evidenced a fair and honest debt from him to the plaintiffs Reeme and Quackenbush, the assignees of the payee, Keith; nor does he claim that any portion of the debt

evidenced by said note has been paid. He wholly fails to show that he had any defense, meritorious or otherwise, in cause 9917, in which the judgment was rendered for about one-tenth of the sum represented by the principal and interest of the original note on which the recovery was had. It is clear that the court had jurisdiction of the subject matter, and, when the appellant demurred to the complaint, it took jurisdiction of his person.

He does not claim that he did not file a demurrer to <sup>373</sup> the complaint, nor does he deny the court's jurisdiction of the subject matter and the parties. Therefore such jurisdiction did exist in cause 9917, and any judgment rendered therein would not be void, however wrongful or erroneous; such judgment not being wholly void, cannot be attacked collaterally: *Exchange Bank v. Ault*, 102 Ind. 322; *Anderson v. Wilson*, 100 Ind. 402; *Lantz v. Maffett*, 102 Ind. 23; *Palmerton v. Hoop*, 131 Ind. 23, 28; *Cully v. Shirk*, 131 Ind. 76, 79; 31 Am. St. Rep. 414; *Harman v. Moore*, 112 Ind. 227; *Rogers v. Beauchamp*, 102 Ind. 33; *Reid v. Mitchell*, 93 Ind. 469. Where judgment is rendered through the unauthorized appearance of an attorney for the defendant, the defendant should not ask to perpetually enjoin the judgment, and have it declared a nullity, but should ask that it be opened up and the proceedings thereon stayed, until there can be a trial on the merits: *Coon v. Welborn*, 83 Ind. 230; *Bush v. Bush*, 46 Ind. 70 (83); *Wiley v. Pratt*, 23 Ind. 628 (635); *Pierson v. Holman*, 5 Blackf. 482. "It may be, on a proper application showing that a judgment had been rendered by default, or for the want of an answer on an appearance by an attorney without authority, and without notice to defendant, even after judgment, the court will allow an issue to be formed and the merits of the case tried; but the court, in order to protect the plaintiff from suffering by the act of the attorney, and at the same time save the defendant from injury, will let the judgment stand, but stay all proceedings and let in the defendant to plead if he has any defense": *Bush v. Bush*, 46 Ind. 70. "Such must now be deemed the settled practice of the court. It will always afford adequate relief to a defendant, while, at the same time, it protects a plaintiff who has obtained a judgment, so far as he can be protected, from some of the injurious consequences to which he might be exposed by the delay": <sup>373</sup> *Wiley v. Pratt*, 23 Ind. 636. "A judgment obtained by fraud is binding on the par-

ties until set aside in some proceeding instituted for that purpose": *Palmerton v. Hoop*, 131 Ind. 28; *Weiss v. Guerineau*, 109 Ind. 438 (444). "These methods, however, all contemplate proceedings in the case in which the unauthorized judgment is alleged to have been obtained. They give no countenance to the notion that a judgment, however wrongfully obtained, may be ignored, and the rights of the parties again inquired into, in a collateral proceeding": *Weiss v. Guerineau*, 109 Ind. 438. Appellant has not sought relief in the original cause 9917, in which the judgment was obtained, but presents a new and collateral action asking to have the judgment rendered therein decreed a nullity, and perpetually enjoined. He has mistaken his remedy, and the court cannot lend him its aid. For the reasons stated we are convinced that the court below did not err in sustaining the demurrer to the appellant's complaint.

The judgment is affirmed.

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**JUDGMENTS—HOW VACATED FOR FRAUD.**—When a party is prevented by fraud from interposing his defense before judgment is rendered he may apply to the court rendering it for its annulment and to be let in to defend on the merits: *Ambler v. Whipple*, 139 Ill. 311; 32 Am. St. Rep. 202, and note.

**JUDGMENTS—COLLATERAL ATTACK FOR FRAUD.**—A party to a judgment obtained by fraud can avail himself of that fraud only in a direct proceeding to vacate and set aside the judgment: *Shultz v. Shultz*, 136 Ind. 323; 43 Am. St. Rep. 320, and note. See, also, the note to *Smithson v. Smithson*, 40 Am. St. Rep. 509, and the extended note to *Morrill v. Morrill*, 23 Am. St. Rep. 106.

**JUDGMENTS—OBTAINED BY FRAUD—BINDING EFFECT OF.**—A judgment, so long as it stands, imports absolute verity as to every proposition of law and fact essential to its existence against all parties to it: *Shultz v. Shultz*, 136 Ind. 323; 43 Am. St. Rep. 320, and note.

**JUDGMENTS RESTING UPON UNAUTHORIZED APPEARANCE OF ATTORNEYS** will be set aside on motion: *Corbitt v. Timmerman*, 95 Mich. 581; 35 Am. St. Rep. 586, and note. See the note to *Williams v. Johnson*, 34 Am. St. Rep. 519.

## SIMMONS v. VANDYKE.

[128 INDIANA, 380.]

## FUGITIVES FROM JUSTICE—ARREST AND DETENTION UPON TELEGRAMS.—

The arrest and detention of a person in one state upon the authority of telegrams received from the authorities of another state, reciting that they have a warrant for his arrest, a copy of which is given, together with the statement that they have started after him with proper papers, is unauthorized, and he is entitled to his release upon *habeas corpus*.

*W. S. Diven, B. McMahan, J. W. Lovett, and H. O. Ryan,*  
for the appellant.

*E. D. Reardon, J. R. Thornburgh, M. P. Turner, and B. H. Campbell,* for the appellees.

380 HACKNEY, C. J. The appellant sought to be released from custody and confinement in the county jail, and filed, in the lower court, his petition for the writ of *habeas corpus*, alleging that the appellees William Vandyke, sheriff of Madison county, and George Welker, a policeman of the city of Anderson, had arrested the appellant, and held him in custody without warrant or legal charge or authority, but upon a pretended charge of forgery in the state of Oregon, and pursuant to the direction of the chief of police of Portland, Oregon, communicated by telegraph; that he had not committed any crime, nor had he been charged with the commission of 381 any crime in this state, and that his arrest had not been ordered by any court or officer of this state.

The appellees made separate returns to the writ, but, by agreement, the returns were considered as joint. By said returns it appeared that Welker was a police officer, and, as such, took the appellant into custody, and delivered him into the custody of Vandyke, as sheriff, for commitment; that he did so upon a telegram received from one Hunt, chief of police of Portland, Oregon, to the effect that he held a warrant for appellant upon a charge of forgery, and directing the arrest; that after the arrest said Hunt sent to Welker, by telegraph, a copy of a warrant issued to and held by him, said Hunt, for the arrest of appellant; that Hunt had sent a further telegram that he had started, with proper papers, for Simmons; that appellees believed appellant guilty of said crime, and made said arrest in good faith, and that they then believed said Hunt *en route* to Anderson to procure the extra-

dition of the appellant. The court overruled exceptions to the returns, and that ruling presents the assigned errors.

The appellees have not aided us with any brief, argument, or citation of authority, and we find no statutory authority for making the arrest, and detaining the appellant, upon the facts stated in the petition and returns. Fugitives from justice from one county in this state to another county in this state may be apprehended by proceedings as provided in section 1667 of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1598), and fugitives from another state into this state may be arrested, detained, and returned upon demand of the executive authority of the state from which the criminal is a fugitive, upon warrant and upon identification as required by section 1668, et seq., of the Revised Statutes of 1894 (Rev. Stats. 1881, sec. 1599, et seq.).

It is manifest that no authority for the arrest and detention <sup>383</sup> under consideration is found in the provisions cited, nor can it be said that the arrest was made upon view, by the officers, of the commission of a crime.

The act of February 12, 1838 (Rev. Stats. 1838, p. 319), authorized proceedings before certain judicial officers of this state, upon which arrests of fugitives from other states were permitted, and their detention directed. That act passed into the Revised Statutes of 1843, page 1030, but has not been included in any subsequent revision. We do not inquire if said act is now in force, since there is no pretense that the arrest and detention in this case were made pursuant thereto.

At common law peace officers have the power to arrest upon information of the commission of a felony, and without a warrant, and do not do so at the peril of proving the commission of the felony: *Doering v. State*, 49 Ind. 56; 19 Am. Rep. 669; 1 Am. & Eng. Ency. of Law, sec. 2, p. 732.

*In re Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382, it was held that under article 4, section 2, of the constitution of the United States, the power to arrest and detain a fugitive until the authorities of the state whose laws had been offended against could make the demand in said section provided was implied. It was said: "The denial of the power to arrest and detain an offender until the demand for his surrender be actually made would, it is manifest, render the provision of the constitution well nigh nugatory. If a person committing a murder, robbery, or other high crime in one state may,

by crossing a river or imaginary line, avoid arrest or detention until an executive requisition and order for his surrender may be obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, a fulfillment of the requirements of the constitution, all require that the arrest and detention of the <sup>383</sup> offender be made wherever he may be found, preparatory to a demand and surrender." As supporting this power are cited *People v. Schenck*, 2 Johns. \*479; *In re Goodhue*, 1 Wheel. C. C. 427; *Commonwealth v. Deacon*, 10 Serg. & R. 125.

We have no doubt that the exercise of the power of detention does not rest wholly with the officer making the arrest, and that he should, within a reasonable time, take the prisoner before a circuit, criminal, or other judicial court and take the judgment of commitment from such court upon complaint in writing, submitting an inquiry as to the presumption of guilt and the good faith of the officer: *In re Heyward*, 1 Sandf. 701; *In re Leland*, 7 Abb. Pr. 64; *Ex parte Cubreth*, 49 Cal. 435.

In this case the appellant was not committed or detained upon such an inquiry, and, whether our courts possess the jurisdiction by statute or by implication is not before us, though the holding of some of the courts seems to imply that jurisdiction: *State v. Buzine*, 4 Harr. (Del.) 572; *In re Washburn*, 4 Johns. Ch. \*106; 8 Am. Dec. 548; *In re Leland*, 7 Abb. Pr. 64; *In re Rutter*, 7 Abb. Pr. 67.

*In re Henry*, 20 How. Pr. 185, was a case in many respects like the present, and it was there said:

"On the return of the writ no affidavits nor any other proof of the alleged larceny have been furnished, but all the information afforded rests in letters unauthenticated except by the signature of the chief of police of Chicago and the telegraphic dispatches purporting to come from him, the last dispatch indicating that a requisition has been finally obtained.

"Under these circumstances I am reluctantly compelled to grant his discharge. The officers were undoubtedly authorized to make the arrest. The rule is that a private person even may arrest a party, if a <sup>384</sup> felony has in fact been committed, and there was reasonable ground of suspicion; but in the case of an officer he is justified in making an arrest if no felony was in fact committed, if he acted upon information from another on which he had reason to rely.

"This is the well-settled rule in the English courts, sanctioned and followed in this state in the case of *Holley v. Mix*, 3 Wend. 350; 20 Am. Dec. 702. In such case the officer acts ministerially, and is entirely justified in making the arrest, and it is a power very important to be exercised to prevent the immediate escape of felons. But he has another duty to perform. In the case where the arrest is made under a warrant, the officer must take the prisoner without any unnecessary delay before the magistrate issuing it, in order that the party may have a speedy examination if he desires it; and, in the case of an arrest without warrant, the duty is equally plain, and for the same reason, to take the arrested party before some officer who can take such proof as may be afforded, or, if the circumstances will justify it, hold the suspected party for further examination: *Pratt v. Hill*, 16 Barb. 307.

"If this is not done with reasonable diligence, the party arrested can apply for a *habeas corpus*, calling on the officer to show cause why he is detained, and with the return to the writ the rule is, that where the arrest is upon suspicion, and without a warrant, proof must be given to show the suspicion to be well founded: 2 Inst. 52. No such proof has been exhibited to me. The original grounds of suspicion indeed remain, and may be deemed presumptively strengthened by the last dispatch, but they contain no element of proof in the legal sense, and would not authorize me to detain him."

The value of personal liberty is too great to permit the detention of a suspected fugitive upon the judgment <sup>385</sup> of a ministerial or peace officer, and without a hearing judicial in character. The inquiry by the circuit court in this case was not extended to an investigation of the cause for detention beyond that stated in the return, and its judgment remanding the appellant was upon the exceptions to the return, and not upon an independent inquiry by the court.

We have felt the loss of that aid which should have been given us by the appellees in a brief in this case, but are equally at a loss to observe the theory upon which the appellant was committed.

The judgment is reversed, with instructions to the circuit court to sustain the appellant's exceptions to the return to the writ of *habeas corpus*. —

**FUGITIVES FROM JUSTICE — ARREST AND DETENTION BEFORE DEMAND MADE.**—A majority of the cases sustain the proposition that, independent of any state statute, a person charged with a felony or other crime in one



state, fleeing to another, may, before demand made on the governor of that state, by the governor of the state from which he has fled, be arrested in the state in which he is found, and detained in custody a reasonable time in order to give the executive of the state whence he has fled an opportunity to issue a requisition for his extradition. The arrest may either be made by virtue of a warrant from a magistrate or by an officer or private person, who may justify the arrest by showing that *prima facie* a felony or other crime has been committed by the prisoner in another state, or that he stands charged therewith: *State v. Anderson*, 1 Hill (S. C.), 327; *Matter of Fetter*, 23 N. J. L. 311; 57 Am. Dec. 382; *Morrell v. Quarles*, 35 Ala. 544; *State v. Buzine*, 4 Harr. (Del.) 572; *State v. Loper*, Ga. Dec., pt. 2, p. 33; *State v. Howell*, R. M. Charlt. 120; *Matter of Henry*, 29 How. Pr. 186; *Ex parte Romanes*, 1 Utah, 23; *People v. Schenck*, 2 Johns. 479; *Matter of Washburn*, 4 Johns. Ch. 106; 8 Am. Dec. 548; *Ex parte McKean*, 3 Hughes, 23.

These decisions rest upon the principle that a fugitive from justice from one state may be arrested and detained in another under article 4, section 2, of the constitution of the United States, preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime was committed. Thus, in the *Matter of Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382-388, Chief Justice Green said: "I am of opinion, both upon principle and authority, that a fugitive from justice, from either of the United States, may, under the provision of the constitution, be arrested and detained in this state preparatory to his surrender, before a requisition is actually made by the executive of the state where the crime was committed. It is an exercise of power essential to the full operation of the constitution, and has been sanctioned by a long and uniform course of practice. Nor is the principle impugned by the fact that the legislatures of several of the states have made express provision by law for the arrest and detention of fugitives from justice prior to an executive requisition for their extradition. It amounts to no more than a regulation of the exercise of an existing right."

Upon the arrest of such a fugitive it is the duty of the arresting officer to immediately take him before a committing magistrate, whose duty, if the proof is sufficient, is to commit him to prison, to the end that a reasonable time may be afforded for the government having him in charge to deliver him up, or for the foreign government to make application to the proper authorities for his surrender. But, if no such application is made within a reasonable time, the prisoner is entitled to his discharge: *Matter of Washburn*, 4 Johns. Ch. 106; 8 Am. Dec. 548; *Matter of Fetter*, 23 N. J. L. 311; 57 Am. Dec. 382; *Ex parte McKean*, 3 Hughes, 23.

There must be some evidence, as a prerequisite to holding the fugitive, that a crime has been committed in the other state, and that he stands charged therewith: *Ex parte Donaghey*, 2 Pittsb. Rep. 166-169; *Ex parte McKean*, 3 Hughes, 23. In one case at least it has been held that the evidence must be such as would be sufficient to commit him for trial if the crime had been perpetrated in the state where he is detained: *Matter of Washburn*, 4 Johns. Ch. 106; 8 Am. Dec. 548.

What is a reasonable time during which a fugitive may be detained in one state awaiting a demand for him by the authorities in another state seems to be a matter wholly within the discretion of the courts of the detaining state. The cases agree that he may be detained a reasonable time, but most of them fail to state the time for which the fugitive has been detained. In one case he was ordered to be detained in prison for three

weeks, notice thereof to be given to the executive of the state whence he had fled, and if he were not demanded within that time he should be discharged: *People v. Schenck*, 2 Johns. 479.

A case similar to the principal case is that of the *Matter of Henry*, 29 How. Pr. 185, wherein it was decided that if an officer arrests a fugitive from justice, on telegraphic or other satisfactory dispatches, without a warrant, it is his duty, equally as if the arrest had been made by warrant, to take the arrested party without any unnecessary delay before some magistrate who can take such proofs as may be offered, or, if the circumstances justify it, hold him for further examination. The court said: "If this is not done with reasonable diligence the party arrested can apply for a habeas corpus, calling on the officer to show cause why he is detained; and with the return of the writ the rule is that, where the arrest is upon suspicion and without a warrant, proof must be given to show the suspicion to be well founded. No such proof has been exhibited to me. The original grounds of suspicion remain indeed, and may be deemed presumptively strengthened by the last dispatch, but they contain no element of proof in a legal sense, and would not authorize me to detain him. This will not probably result in any practical defeat of justice if the party is guilty, or a case of strong suspicion exists, since there is nothing that I can see to prevent his arrest upon a warrant regularly issued by some competent authority, and his detention until a proper examination can be had, or a requisition be made to do its appropriate office": *Matter of Henry*, 29 Barb. 187. To the same effect is *Matter of Rutter*, 7 Abb. Pr., N. S., 67.

In *Harris v. Louisville etc. R. R. Co.*, 35 Fed. Rep. 116, it was decided that a private detective in pursuit of a fugitive from justice from another state cannot arrest without a warrant by merely procuring a regular police officer to make the arrest. In deciding this case Hammon, J., said that such fugitive from justice was entitled to "exemption from all arrest, except by due process of law, which means an accusation made before a proper tribunal, and a written warrant authorizing the arrest, unless it be that, under circumstances not pretended here, there may be a temporary detention until the magistrate may be reached. In such cases it is the duty of the arresting party to carry his prisoner immediately before a magistrate of lawful competency for that purpose, to accuse him there according to the forms of law, and obtain the necessary magisterial sanction for any further detention. This temporary proceeding, without previous warrant, can only be resorted to where there is an urgent necessity for proceeding without the delay of procuring a warrant beforehand, and the detention can only last long enough to bring the prisoner before the magistrate for proper inquiry. There is not the least excuse here for any departure from the regular method of proceeding. If the plaintiff or the real culprit who was wanted had been 'located' as this detective had reported and thought him to be, nothing was easier than to have gone before the magistrate, made the accusation on oath, and, having procured the warrant, proceeded to the arrest. This not being done the arrest was unlawful. So if, being otherwise arrested, he was not immediately taken before a magistrate and accused, that was unlawful. The arresting officer cannot lock up and detain his prisoner to suit his convenience for further inquiry; nor by the prisoner's consent can this be done. He must be taken before a magistrate for his protection there, and only by the sanction of that magistrate can he be detained, either with or without his consent": *Harris v. Louisville etc. R. R. Co.*, 35 Fed. Rep. 119. Some cases deny the right in the absence of statute

to arrest a fugitive from justice in one state before a demand has been made by the executive of the state in which the alleged crime was committed. These cases hold that such arrest cannot be made either with or without a warrant, but are not well reasoned, and are contrary to the great weight of authority; *Commonwealth v. Deacon*, 10 Serg. & R. 125; *People v. Wright*, 2 Caines, 213; *Malcolmson v. Scott*, 56 Mich. 459.

*Statutes in Many of the States* provide that a fugitive from justice in one state who has fled therein from another state may be arrested and detained upon proper evidence awaiting a demand for his return by the executive of the state where the crime was committed. Such statutes are valid and not in conflict with the second section of article 4 of the constitution of the United States: *Ex parte Cubreth*, 49 Cal. 435; *Ex parte White*, 49 Cal. 433; *Ex parte Rosenblatt*, 51 Cal. 285; *Ex parte Ammons*, 34 Ohio St. 518; *Commonwealth v. Tracy*, 5 Met. 536. These statutes must be strictly complied with. Under them, in order to hold a fugitive from justice to await the requisition of the executive of another state, it must affirmatively appear from the complaint on file before the committing magistrate of the state to which such party has fled that a crime has been committed in such other state, that the accused has been charged in that state with that crime, and that he has fled from justice and is within the state where the arrest is made. These are essential jurisdictional facts and must appear to authorize the arrest and detention; they cannot be inferred: *Matter of Heyward*, 1 Sandf. 701; *Ex parte Lorraine*, 16 Nev. 63; *Ex parte White*, 49 Cal. 433; *Ex parte Cubreth*, 49 Cal. 435; *State v. Swope*, 72 Mo. 399; *Tullis v. Fleming*, 69 Ind. 15; *Matter of Leland*, 7 Abb. Pr., N. S., 64; *Matter of Rutter*, 7 Abb. Pr., N. S., 67. Such statutes contemplate that the charge of the crime against the person to be arrested and delivered up must be made in the state where the offense was committed. The charge must be to some court, magistrate, or officer in the form of an indictment, complaint, or other accusation known to the laws of such state. A complaint made before a magistrate in the state where the fugitive is arrested and sought to be detained which fails to allege that such charge is pending against the accused in the state where it is alleged the offense was committed does not confer jurisdiction on such magistrate: *Smith v. State*, 21 Neb. 552; *State v. Hufford*, 28 Iowa, 391. An affidavit merely embodying a hearsay statement that the prisoner is charged with crime in another state, and is a fugitive from justice, without presenting an authenticated copy of the charge or indictment against him in such state, is insufficient to authorize his detention: *Matter of Leland*, 7 Abb. Pr., N. S., 64. If a warrant of arrest is necessary under the statute the warrant is void unless it specifies the offense alleged to have been committed: *Ex parte Cubreth*, 49 Cal. 435. In the absence of a statutory requirement that a warrant issue it is not necessary that one shall be issued for the fugitive, alleging the charge against him before his return can be demanded from the state to which he has fled. It is the indictment or affidavit and not the issuing of a warrant which constitutes the charge against him upon which his return can be required: *Tullis v. Fleming*, 69 Ind. 15. If the statute, however, provides that a warrant shall issue for the arrest of a fugitive from justice from another state his arrest without such process is illegal and void and renders the arresting party liable for an assault and battery: *State v. Shelton*, 79 N. C. 605; *Botts v. Williams*, 17 B. Mon. 687.

## BEASLEY v. STATE.

[128 INDIANA, 552.]

**LARCENY BY TRICK OR ARTIFICE.**—One who obtains the money or goods of another by some fraudulent trick or artifice and carries them away is guilty of larceny.

**LARCENY BY HUSBAND FROM WIFE.**—A husband who obtains his wife's money by trick or artifice and carries it away is guilty of larceny if the circumstances attending the wrongful act are such that, if performed by another, it would constitute a felonious asportation.

**LARCENY BY HUSBAND FROM WIFE.**—Under the enabling statutes of Indiana a husband's interest in his wife's goods and chattels is abolished, as is also the right to fraudulently misappropriate them. Hence he may be guilty of larceny of the goods of his wife.

*E. A. Ely and S. G. Davenport*, for the appellant.

*A. G. Smith, attorney-general, W. E. Cox, prosecuting attorney, and A. J. Beveridge*, for the state.

552 **DAILEY, J.** In this case the appellant, Alfred D. Beasley, was charged, by indictment, with the larceny of two hundred and sixty-five dollars in money, and one watch of the value of twenty-five dollars, of the goods and chattels of Ena C. Beasley, who was then his wife. The appellant moved to quash the indictment, which motion was overruled by the court, and exceptions were properly reserved by him. There was a trial by the court, and finding of guilty, and his punishment assessed at imprisonment in the state prison for six years, and a fine of five dollars.

The appellant moved for a new trial and filed his written reasons therefor, which was overruled by the court and excepted to by him. Judgment was rendered upon the finding, from which this appeal is prosecuted.

The assignment of errors presents two questions: 1. Was the verdict sustained by the evidence? 2. Can a married man commit larceny as to the goods of his wife?

We will consume little time in the consideration of the first question. The evidence in the record presents a case against this appellant of extreme moral turpitude. From beginning to end it is fraught with shame and ignominy. On January 7, 1894, he and Ena C. Thompson were married in the state of Ohio. She was possessed of an estate of about two hundred and sixty-five dollars, consisting of money loaned, inherited from a deceased grandmother. He obtained from her a twenty-five dollar watch, induced her to collect all this money, and assisted in doing so. By his persuasion

she gave him ten dollars before starting for Petersburg, Indiana, placed fifty dollars in her dress pocket, and sewed two hundred and five dollars in the lining of her skirt. When they reached Newark, Ohio, he took the fifty dollars and insisted upon her giving him the remaining <sup>554</sup> two hundred and five dollars, under the pretense that it was not safe to carry it, and he would take it and get a draft. He paid their expenses, including their transportation out of the sixty dollars thus obtained. At Cincinnati, Ohio, they repaired to a boarding-house, where he performed the delicate operation of cutting the skirt, from which he abstracted the two hundred and five dollars already mentioned. As an excuse for the act, he said he would buy a draft for the amount. He went up street, as he stated, for that purpose, and returned, falsely informing her that he had bought one and mailed it to Petersburg. They went by boat from Cincinnati to Louisville, Kentucky, and the spouse engaged with others on the way in card playing until midnight. When they arrived at Louisville they went to a hotel, after which he rode out in a cab without her.

They embarked on a boat for Evansville, Indiana, and the defendant indulged his passion for playing cards during the entire trip. They put up at a hotel and registered. Thereupon he left her and was gone about the city until 12 o'clock at night. When he returned he said he was going to Henderson to stay two or three days with friends, and that she could remain in Evansville. After he had fallen asleep she took her watch and money from his clothing, and concealed the money in her sleeve. When he awoke the next morning he missed the watch and saw that the money was gone. He said they had been robbed, notified the landlord and called detectives. When a detective came she told the story and surrendered the money and watch to him. He advised her to keep them, and gave them back to her. They were ejected from this hotel and went to another. Appellant borrowed five dollars of her upon the excuse that he wanted to pay it to one Posey, whom he owed. He went up street and bought a revolver and cartridges, returned, entered <sup>555</sup> the room his wife occupied, said he was "mad," stood with his face to the window and his back to her, loading the weapon, snapped it once or twice, said he "would not snap it any more," "the next one was loaded." The wife said: "You don't need to kill me." He replied: "I may have to use it on myself."

"God knows what you will do next." "I am too mad to talk about the money." "Give me that money." She gave him five dollars and said, "Is that enough?" and he said "No." She then gave him ten dollars and asked if that was enough, and he said "Give me the rest." She then gave him one hundred and eighty-five dollars, all the balance she had. He was standing with the loaded pistol in his pocket when she gave him the money. She was afraid of him; says she did not part with her money voluntarily nor of her own free will.

They left Evansville, passed through Petersburg, went to Washington, Indiana, and put up at a hotel. He registered her as "Miss Thompson, Newark, O." But it seems she did not know this fact until the next morning, when she received the following infamous letter:

"OFFICE OF THE TRUSSLER HOUSE,

"HENRY KLOHR, PROP.,

"Location opposite O. & M. depot, in central section of city.

"WASHINGTON, IND., Jan. 18, 1894.

"ENA: Enclosed find \$25 to pay your fare home. It is now 12 o'clock, and I leave in about 20 minutes for St. Louis. I lost all your money to-night on a poker game. Your board bill is paid. You are registered as Miss Thompson, of Newark, so be careful you do not say you are married. I saw mother. She would see that your trunk was expressed to you, but she did not want to see you. I join my brother Will at St. Louis. Good-bye.

Yours,

"AL."

All this transpired during the honeymoon. It seems, <sup>see</sup> from the record, that the wife was induced to come to Indiana upon the promise that the defendant would establish their home at Petersburg, so she could invest her means in a newspaper enterprise. When she was inveigled into this state, and was looted of her inheritance, the defendant was gracious enough to surrender twenty-five dollars of the plunder he had taken from her, so that she might not be compelled to walk back to the state of Ohio.

The wedding tour being thus completed, and the appellant in possession of the most of his booty, the betrayed wife went to Petersburg to see his mother. Not obtaining satisfaction, she then began proceedings against him and left for her home in Ohio. While there she received from him insulting and infamous letters, too vulgar and indecent to be copied into this

opinion, threatening to cover her with shame and disgrace if she did not abandon the prosecution. This is, in short, the brief, pathetic story of her wrongs. There is no denial; no palliation. But it is said there was no larceny because the money was not taken from the prosecuting witness without her consent. It is well settled that where one obtains money or goods by some fraudulent trick or artifice, and carries them away, he is guilty of larceny: Moore's and Elliott's Indiana Criminal Law, sec. 368, and cases there cited.

The main contention upon which appellant's counsel rely, in their able brief, is that husband and wife, living together as such, cannot steal one from the other; that, to constitute a valid charge of larceny, the indictment should show that at the time of the alleged crime they were living separate and apart, and that the taker then had neither the possession nor right to possession of the other's property. This is urged at great length, with liberal quotations from the common law and sacred history to the effect that husband and wife are one person, <sup>557</sup> and hence incapable of larceny one from the other. Such was the law for ages, and so remains, unless overthrown by the legislative enactments of 1881 and prior thereto.

By section 5324 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 7289) marriage is declared to be a civil contract into which males of the age of eighteen and females of the age of sixteen, not under certain disabilities therein specified, are capable of entering. The only difference between it and other contracts is that marriage is the more priceless and sacred.

By section 5115 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 6960) all the legal disabilities of married women to make contracts are abolished, except as further provided in the act of which it is a part.

Section 5117 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 6962) provides that: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were (sole and) unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange, and convey her personal

property; and she may also, in like manner, make any contracts with reference to the same," etc.

The same section also provides that "she shall be bound by an estoppel *in pais*, like any other person."

Section 5118 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 6963) binds a married woman by her covenants of title in conveyances of her separate property, as if sole, and, in like manner, as principal on her official bond.

Section 5120 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 6965) makes all married women liable for torts committed <sup>558</sup> by them, and exempts the husbands from liability from the contracts or tort of their wives.

Section 5130 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 6975) vests a wife with the earnings or profits accruing from her separate trade or business.

Section 5131 of the Revised Statutes of 1881 (Burns' Rev. 1894, sec. 6976) empowers her to prosecute or maintain actions in her own name against persons for damages for injuries to her person or character, the same as if she were sole; and gives her the money so recovered.

Prior to the enactment of the several sections of the statutes of this state the common-law fiction prevailed of the legal unity of husband and wife. In the eye of the law they were one person, and the husband was that person.

In Blackstone's Commentaries, book 2, \*433, the old rule is thus stated: "A sixth method of acquiring property in goods and chattels is by marriage; whereby those chattels which belonged formerly to the wife are, by act of law, vested in the husband with the same degree of property and the same powers as the wife, when sole, had over them. This depends entirely on the notion of a unity of person between husband and wife; it being held that they are one person in law, so that the entire being and existence of the woman is suspended during coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever personal property belonged to the wife, before marriage, absolutely vested in the husband."

The learned judge below held the indictment good upon the ground that the recent statutes give the wife exclusive control and authority over her personal property, and have greatly enlarged her personal rights as to the disposition thereof, making contracts and doing whatever a *feme sole* might do; and that the effect of such <sup>559</sup> statutes is to sever



the unity of person and community of property heretofore existing between husband and wife. There seems to be sound logic in this position. By virtue of these beneficent statutes a woman may hold her own property; make her own money; enter into her own contracts; pay her own debts. She may even contract with her own husband. If he defrauds her she may recover. If a woman may contract under these statutes with her husband and recover for a breach of contract, or for cheating her, it would seem reasonable to conclude that he may steal from her also, where the circumstances attending the wrongful act are such that if performed by another it would constitute a felonious asportation. Under the enabling statutes of Indiana the husband's interest in the wife's goods and chattels is abolished, and with its destruction the right also to fraudulently misappropriate them.

In *Garrett v. State*, 109 Ind. 527, the defendant was indicted for burning the property of "another person," to wit: The property of Hannah Garrett. The evidence showed that he and his wife Hannah, the owner of the dwelling-house so destroyed, occupied, used and dwelt therein, as their habitation, and yet this court said: "If a man unlawfully, feloniously, willfully, and maliciously sets fire to and burns the dwelling-house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute."

Arson, as defined in our statute, is an offense against the property as well as the possession. Larceny is also an offense against the right of private property, and, if the husband can commit the crime of arson against her private property, it would seem to follow as a legal conclusion that he can also perpetrate the crime of larceny of the wife's goods.

See In our opinion the judgment of the trial court should be, and it is, affirmed.

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LARCENY BY TRICK.—One may be convicted of larceny of property which he obtained from another by fraud, premeditated trick, or device: *Commonwealth v. Lannan*, 153 Mass. 287; 25 Am. St. Rep. 629, and note. See, also, the extended notes to *Grunson v. State*, 46 Am. Rep. 185, and *State v. Homes*, 57 Am. Dec. 279.

LARCENY BETWEEN HUSBAND AND WIFE is discussed in the extended note to *State v. Homes*, 57 Am. Dec. 283.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MISSOURI.**

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**THE FAMOUS SHOE & CLOTHING COMPANY v.**  
**CROSSWHITE.**

[124 MISSOURI, 34.]

**NEGOTIABLE INSTRUMENTS—RULES GOVERNING NEGOTIABILITY.**—Under a statute making promissory notes negotiable, a promissory note, to be negotiable, must be in conformity with the statute as to matter of form, but such statute leaves all other instruments to be governed, as to their negotiability, by the law merchant.

**CHECKS—NEGOTIABILITY.**—A check, with or without the words "value received," is negotiable.

**CHECKS—FRAUD IN PROCURING—BONA FIDE HOLDER—EVIDENCE.**—Ordinarily, the holder of a check, who seeks to recover thereon, is not bound to account for its possession; but, when fraud in its procurement from the maker is shown, it devolves upon the plaintiff to prove that he is a *bona fide* holder. Such a showing entitles him to recover.

**CHECKS—RIGHTS OF BONA FIDE HOLDER NOT AFFECTED BY CUSTOM.**—It is no defense to an action on a check by a *bona fide* holder and indorsee thereof that the drawer, in delivering it to a person who represented himself as another, relied on the custom of the bank on which it was drawn of requiring the payee to be identified.

*W. C. and J. C. Jones*, for the appellant.

*C. P. and J. D. Johnson*, for the respondent.

**36** **BLACK, P. J.** The plaintiff is a corporation engaged in a mercantile business in the city of St. Louis, and the defendants are partners engaged in buying and selling horses and mules, under the firm name of Crosswhite, Patton & Rubey.

This suit is based upon the following check:

“ST. LOUIS, Oct. 27, 1890.

“Pay to Herman Hickie, or order, one hundred and forty-nine x-100 dollars.

“To Mullanphy Savings Bank, } Crosswhite, Patton & Ru-  
St. Louis, Mo. } bey.”

Indorsed: “HERMAN HUICKEL.”

The above spelling of the name of payee and indorser is taken from the check as we find it in the transcript, but hereafter we follow the statement of agreed facts in that respect. According to the agreed facts one Herman Wilke appeared at the defendant's place of business on the day of the date of the check, and represented his name to be Herman Heckle, and that he was the owner of two mules which he then sold <sup>37</sup> and delivered to the defendants, and, in payment therefor, they gave him the check in question. On the same day Wilke went to the plaintiff's place of business and purchased merchandise to the amount of seventy-four dollars and fifteen cents, and in payment therefor indorsed the check under the name of Herman Huickel and delivered it to the plaintiff, and the plaintiff paid him the difference, namely, seventy-four dollars and eighty-five cents. The plaintiff received the check from Wilke without making inquiry of him as to how he obtained it, though he was unknown to the plaintiff's agents who sold the goods, and without his being identified. On the same day the plaintiff presented the check to the bank for payment, but payment was refused because of directions given to the bank by defendants, they having learned that the mules had been stolen by Wilke.

Plaintiff procured the arrest of Wilke, and recovered back a part of the merchandise and money. If plaintiff is entitled to recover at all it is agreed the amount it should recover is sixty-one dollars and fifteen cents.

The trial court gave judgment for the defendants, and that judgment was affirmed by the St. Louis court of appeals, and the cause was then transferred to this court because Judge Thompson deemed the opinion opposed to *St. Johns v. Homans*, 8 Mo. 382, and *Ivory v. Bank*, 36 Mo. 475; 88 Am. Dec. 150.

The first question is whether this check is a negotiable instrument. The court of appeals held that it was not, and this is the line of argument: No instrument, except a bill of exchange, is negotiable in this state unless it appears on its face to have been issued for value received; this check does

not profess on its face to have been issued for value received, nor is it a bill of exchange, and hence it is not negotiable.

The chief error in this argument lies in the major proposition, which has for its authority *Lowenstein v. Knopf*, 2 Mo. App. 159, where the conclusion is <sup>28</sup> expressed that bills of exchange and instruments containing the words "value received" are the only negotiable instruments which we have in this state, because the statute declares no other instruments negotiable.

The statute provides: "Every promissory note for the payment of money to the payee therein named, or order or bearer, and expressed to be for value received, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange."

It is to be remembered that for a long time Lord Holt held that promissory notes were not negotiable, while the merchants of Lombard street insisted they were negotiable. Parliament interfered, and overruled Holt by the act of Anne. This court, at a very early day, declined to follow the ruling of Lord Holt, holding that promissory notes were negotiable by the common law: *Irvin v. Maury*, 1 Mo. 194. The legislature, however, to put the matter at rest in this state, enacted a statute which, after some changes, comes down to us in the language above quoted.

Now, the object and whole object and purpose of this statute was to make promissory notes negotiable. A promissory note to be negotiable must, of course, conform in form to the statute; but the statute leaves all other commercial instruments where the law merchant places them. If negotiable by that law they are negotiable in this state. This is too clear to admit of any doubt.

Are checks negotiable by the law merchant? Before answering this question it is well to remember that some writers treat checks as bills of exchange, with some peculiarities; while other writers treat them as distinct commercial instruments, having some features in common with bills of exchange. While the controversy is largely one of words only, the latter <sup>29</sup> method of treating checks seems to be the least objectionable, because it comports with commercial usage. It is said by the supreme court of the United States: "Bank checks are not inland bills of exchange, but have many properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both"; and the

court then goes on to point out many matters in which they are alike and many in which they differ.

As to the element of negotiability it is said: "Checks are commercial paper, and are generally affected by the rules which affect commercial paper. Thus the holder of a check payable to bearer, or indorsed in blank, is presumed to be the owner, *bona fide* and for value. It is only after proof that the original issue of the check was a fraud, or that it was lost by the drawer before issue, that such a holder will be required to show his *bona fides* to prove that he has given value for the check, and that he has come into possession of it in the usual course of business. If, being obliged to show these facts, he does so successfully, it then makes no difference under what circumstances of fraud or loss the check originally left the drawer's hands; the holder shall retain and shall recover upon it at least as much as he has paid for it": 1 Morse on Banks and Banking, 3d ed., sec. 393.

Another writer says: "A check, like a bill or note, in order to be negotiable, must be payable absolutely and at all events to a certain person or order, or to bearer, in money." And, "whenever a check is negotiable, it is undoubtedly subject to the same principles which govern ordinary bills of exchange in respect to the rights of the holder": 2 Daniell on Negotiable Instruments, 4th ed., secs. 1651, 1652. See, also, to the same effect, Tiedeman on Commercial Paper, sec. 440; *Burns v. Kahn*, 47 Mo. App. 216; *Fulweiler v. Hughes*, 40 17 Pa. St. 440; *Fuller v. Hutchings*, 10 Cal. 523; 70 Am. Dec. 746; *Merchants' etc. Bank v. New Brunswick Sav. Inst.*, 33 N. J. L. 170; *Bank v. Heald*, 25 Md. 573.

We find nothing in any of the cases in this court to which we are cited which is in conflict with what has been said. They discuss other properties and qualities of checks. The remarks made in *St. John v. Homans*, 8 Mo. 382, and in *Morrison v. McCartney*, 80 Mo. 186, go far to show that the court deemed checks negotiable instruments. It is true the drawer of a check may stop payment, and in doing so he takes upon himself all the consequences of his act; but this has nothing to do with the question in hand.

Although the check in question does not contain the words "value received," it is a negotiable instrument, and the plaintiff's rights must be governed accordingly. The plaintiff was not, in the first instance, bound to account for possession of the check; but, it being shown, as it was, that the check was

procured by the payee by fraud, it then devolved upon the plaintiff to show that it was a *bona fide* holder. With such a showing, the plaintiff was entitled to recover: 2 Daniell on Negotiable Instruments, 4th ed., sec. 1652; 1 Morse on Banks and Banking, 3d ed., sec. 393; *Merchants' etc. Bank v. New Brunswick Sav. Inst.*, 33 N. J. L. 170; *Fuller v. Hutchings*, 10 Cal. 523; 70 Am. Dec. 746. The agreed facts show that plaintiff took the check in the usual course of business, and paid full value therefor, without any notice of the fraud. The loss must therefore fall upon defendants, who issued and put it in circulation. To hold otherwise would overthrow what we understand to have always been the law in this state.

2. The defendants place considerable reliance in this court upon the custom stated in the following further agreed facts:

“At the time the defendants stopped the payment of said check as aforesaid they did not know that it had been transferred to plaintiff, nor did plaintiff know the circumstances under which the said Wilke had obtained the same from defendants, nor that payment thereof had been stopped by them, or that he was not Herman Huickel.

“It was then and there the custom of the said Mullanphy Savings Bank, as well as of all other banks of the city of St. Louis, to require persons presenting checks drawn upon it, if unknown to its officers or agents, to identify themselves to the said bank before paying the amount called for by the check. This custom was then and there well known both to the plaintiff and the defendants, and the said Mullanphy Savings Bank would not have paid the said check to the said Wilke without his being known or identified to the said bank or its officers as Herman Heckle, the payee therein named, if he had presented the same to the bank for payment. The defendants gave the said check to the said Wilke in payment of said mules because they did not know him personally, and because they knew of the custom of said bank, and that he would have to be known or identify himself to the said bank or its officers before the amount of said check would be paid to him by the bank.”

We cannot see that this custom affects the rights of the plaintiff in the least. It relates alone to the identification of persons who present checks to banks for payment, and is no more than the usual precaution which banks adopt for their own protection. It does not attempt or undertake to limit, restrict, or qualify the negotiable character of checks. The

custom is no defense whatever to this action. The judgment of the court of appeals is reversed and the cause remanded to <sup>as</sup> that court, with directions to it to reverse the judgment of the circuit court and to direct the circuit court to enter up judgment for the plaintiff.

All concur.

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**CHECKS—NEGOTIABILITY.**—A bank check is much the same as an inland bill of exchange, and is governed generally by the law applicable to such bills, and to promissory notes: *Barnet v. Smith*, 30 N. H. 256; 64 Am. Dec. 290, and note; *Morrison v. Bailey*, 5 Ohio St. 13; 64 Am. Dec. 632, and note. It is as transferable as a bill of exchange, but is not deemed due until payment is demanded: *Walker v. Geisse*, 4 Whart. 252; 33 Am. Dec. 60. When a check is payable to order it is negotiable by indorsement: *Barbour v. Bayon*, 5 La. Ann. 304; 52 Am. Dec. 593; but it must be presented for payment within a reasonable time in order to hold the drawer, in case of nonpayment; and an unreasonable delay in presenting it is generally at the peril of the holder. See monographic note to *Holmes v. Briggs*, 17 Am. St. Rep. 807, discussing the duty of the holder of a check in order to make the drawer or indorser liable thereon. The words "value received" are not essential to the negotiability of an instrument: *Franklin v. March*, 6 N. H. 364; 25 Am. Dec. 462.

**NEGOTIABLE INSTRUMENTS—FRAUD IN PROCURING—RECOVERY.**—The holder of a negotiable instrument, who acquires it *bona fide*, without notice in the usual course of business, for a valuable consideration, and before maturity, takes the paper unaffected by fraud in its origin: See monographic note to *Bedell v. Herring*, 11 Am. St. Rep. 309, discussing the subject; monographic note to *Willard v. Nelson*, 37 Am. St. Rep. 453, on fraud in procuring the delivery of negotiable instruments. If the fraudulent inception of a note is shown, the burden of proof is on the person claiming to be a *bona fide* holder to show under what circumstances he acquired it: *Cover v. Myers*, 75 Md. 406; 32 Am. St. Rep. 394; notes to *Market etc. Nat. Bank v. Sargent*, 35 Am. St. Rep. 379; *Breckenridge v. Lewis*, 30 Am. St. Rep. 358.

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## DICKSON v. OMAHA & ST. LOUIS RAILWAY CO.

[124 MISSOURI, 140.]

**MASTER AND SERVANT—DUTY OF MASTER TO FURNISH A SAFE PLACE IN WHICH TO WORK.**—A railroad company, especially in thickly settled portions of the country, is bound to keep its track safe and free from obstructions by proper fences, upon the principle that the master is bound to use ordinary care in keeping the premises upon which his servant is required to work in a condition reasonably safe and secure for the performance of the duties required of him.

**RAILROAD COMPANIES—LIABILITY TO EMPLOYEE FOR INJURIES DIRECTLY CAUSED BY DEFECTIVE FENCE.**—An employee upon a railroad train, and, in the event of his death, his representatives, may recover for injuries received without his own fault by reason of the company's negligence in failing to comply with the law requiring it to fence its track.

**THE PROXIMATE CAUSE OF AN EVENT** is that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition.

**RAILROAD COMPANIES—DEFECTIVE FENCE IS PROXIMATE CAUSE OF ACCIDENT, WHEN.**—If a railroad company fails to keep its track fenced as required by law, and a bull strays thereon through a defect in the fence, and collides with a passing engine, whereby its front wheels are derailed, and it is soon thrown over, killing the engineer, notwithstanding it has been reversed and the air-brake applied, the negligence of the company in failing to keep the fence in repair is the proximate cause of the accident, though the engine is running faster than allowed by the rules of the company, and is thrown from the track by reason of coming into a switch, in its derelict condition, nearly a thousand feet from where it struck the bull.

**NEGLECTANCE—FAILURE TO TAKE BEST COURSE TO AVOID INJURY IS NOT, WHEN.**—That one does not adopt the safest and best course to avoid injury, when suddenly exposed to great and imminent danger, does not make him chargeable with negligence. Under such circumstances he is not expected to act with that degree of prudence and wisdom that would otherwise be required of him.

**RAILROAD COMPANIES—ENGINEER NOT OBLIGED TO INSPECT FENCES.**—If a railroad company, required by law to keep its track fenced, neglects to do so, and a collision occurs with a bull entering upon the track through a defect in the fence, whereby the engineer is killed, it is not error, in an action against the company to recover for the engineer's death, to refuse to instruct the jury that the deceased was under the same obligation to inspect and ascertain existing defects as was required of the company.

*Theodore Sheldon and E. E. Aleshire, for the appellant.*

*Alexander H. Waller, for the respondent.*

144 **MACFARLANE, J.** This action is brought by Lena Dickson, widow of James Dickson, deceased, against the Omaha & St. Louis Railway Company, to recover the sum of five thousand dollars, for alleged negligence of the railway company, resulting in the death of Dickson, near Evona, Missouri, on May 16, 1891.

The petition avers that on that day deceased was in the employ of defendant as locomotive engineer, and was operating one of its locomotives attached to a freight train. While so operating said engine a collision occurred with a bull, which had strayed upon the track through a defective fence, by reason of which collision the engine was thrown from the track and overturned, thereby killing Dickson; that the bull got upon the track, and the accident occurred, at a point where the law required the defendant to erect and maintain the fence; that defendant was negligent in that, although it



was required by law to maintain said fence, it failed to do so, and, by reason of said negligence, plaintiff's husband was killed, and she prays damages as above.

To the petition the defendant entered a general denial, which it supplemented with the allegations that, if the fence was defective, Dickson knew of such defect; that, at the time of the accident, Dickson was violating the rules of the company in running his engine at a high, forbidden, and dangerous speed; that the injury was not due to the collision with the bull, but was caused by striking a three-throw switch at great distance from the point where the collision occurred, and that, after the collision with the bull, Dickson might have avoided all injury by the exercise of ordinary care.

The testimony offered tended to show that on the <sup>145</sup> morning of May 16, 1891, Dickson, then operating one of defendant's trains as engineer, was approaching the station Evona, going east. When the engine was about nine hundred and fifty feet west of the west switch, and moving at from fifteen to twenty miles an hour, it collided with a bull which had strayed upon the track through a defect in the railroad fence along the right of way. The bull was carried on the cowcatcher about one hundred feet, and then rolled on the track in front of the engine. The only effect of the collision was to derail the front pair of small wheels under the engine. These kept on the ties close to the rails. All the rest of the train kept the track for eight hundred and fifty feet, and until the west switch was reached. After colliding with the animal, Dickson reversed his engine and applied an air-brake, with which the engine was fitted. He then climbed through the window of his cab out on to the running-board of the engine, and, after walking its length, stepped down upon the steam-chest, and there stood until the west switch was reached. The engine, when it reached this switch, was running about twelve miles an hour. Upon striking the switch, with its front small wheels derailed, the engine was thrown over, and Dickson, who was then standing upon the steam-chest, was also thrown to the ground, and crushed to death by some part of the engine or tender. The fireman jumped off within sixty or seventy feet from the place where the bull was struck. When last seen, Dickson was leaning over, watching the derailed wheel under him, which was moving over the ties. After the application of the air-brake on the engine the train began to slow up, until its

speed at the switch was reduced to about twelve miles an hour.

One of the rules of defendant was as follows: <sup>146</sup> "Freight trains must be under control when approaching and passing through the stations, and be prepared to stop in case the track is obstructed."

At the conclusion of the testimony defendant unsuccessfully demurred to the evidence.

Any other necessary facts will sufficiently appear in the opinion. The case was submitted to the jury upon instructions given by the court, which need not be set out here. Some instructions asked by defendant were refused. They will be sufficiently noticed in the opinion. The judgment was for plaintiff for five thousand dollars and defendant appealed.

1. The only negligence charged as ground for recovery is the failure on the part of defendant to observe the statutory requirement to so keep its fence in repair as to prevent cattle from straying on its railroad. Defendant insists that the statute requiring railroad companies to make and maintain fences on the sides of their roads is designed solely to prevent injuries to the domestic animals of adjacent landowners, and does not create a duty from defendant to its employees.

The duty of a master to his servant requires the exercise of reasonable care, not only to provide safe, adequate, and suitable machinery and appliances for his use, but also such care to keep the premises upon which he is required to work in a condition reasonably safe and secure for the performance of the duties required of him. The degree of care must depend largely upon the character of duties required of the servant, the peril to which he is exposed from failure to observe it, and the opportunity he has for avoiding the dangers. There are but few, if any, duties a servant is called upon to perform which are attended with more hazards than those attending the running and management of locomotives and trains upon railroads, <sup>147</sup> and the care the law requires of the master in respect to providing reasonably 'adequate and safe engines and cars is no greater than that required in furnishing a reasonably safe track and keeping it free from obstructions. The dangers from defects are as great in one as the other, and the care should be commensurate with the dangers: *Henry v. Wabash etc. Ry. Co.*, 109 Mo. 493, and cases cited.

We are taught by common experience that cattle and other animals, unless restrained, will stray upon the track of railroads and cause serious and dangerous obstructions to the operation of trains thereon, thereby imperiling the lives, not only of persons carried, but to a greater degree of each employee engaged in the duty of managing them. We can see no reason why, at common law, the railroad company would not as well be required to use reasonable care to prevent such obstructions as to see that the ties and rails are sound and the roadbed secure. I can conceive of no more adequate method that could be adopted by a railroad corporation for keeping domestic animals off the track of its road than that of inclosing it by fences. So it has been held that, if the want of a proper fence makes a railway unsafe, and an accident happens to a passenger in consequence, the company are responsible to him, although they are under no obligation to the adjacent landowner: *Buxton v. Northeastern Ry. Co.*, L. R. 3 Q. B. 549.

It is true that the statute requiring railroad corporations to fence their tracks, only in express terms, gives to the owners of cattle or other animals killed or injured in consequence of a neglect to perform this duty a right of action, yet it has been held in this state that the law was designed likewise for the protection and safety of the traveling public: *Briggs v. St. Louis etc. Ry. Co.*, 111 Mo. 173, and cases cited.

The United States supreme court, in discussing the <sup>148</sup> Missouri fencing law and its constitutionality under the police power, uses this emphatic language: "In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattleguards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential. The omission to erect and maintain such fences and cattleguards in the face of the law would justly be deemed gross negligence": *Missouri Pac. Ry. Co. v. Humes*, 115 U. S. 522.

Thus, while the statute only imposes upon the corporation, as a penalty for nonobservance of the law, double damages for animals killed or injured, the duty to fence is made obligatory. The duty is absolute and unqualified, and is reasonably supposed to have been intended for the protection of all

persons upon railroad trains who are exposed to danger by such obstructions, whether they be passengers or employees.

The right of a passenger to recover for personal injuries incurred on account of such negligence has been declared: *Blair v. Milwaukee etc. R. R. Co.*, 20 Wis. 254; *Fordyce v. Jackson*, 56 Ark. 597; *Gulf etc. Ry. Co. v. Wilson*, 79 Tex. 871; 23 Am. St. Rep. 345. And also of a parent to recover for the death of an infant child who wandered upon a railroad track by reason of a defective fence and was struck by a train: *Keyser v. Chicago etc. Ry. Co.*, 56 Mich. 559; 56 Am. Rep. 405; *Stuetgen v. Wisconsin Cent. R. R. Co.*, 80 Wis. 498; *Isabel v. Hannibal etc. R. R. Co.*, 60 Mo. 484; *Singleton v. Railroad*, 7 Com. B., N. S., 287; *Chicago etc. Ry. Co. v. Grablin*, 38 Neb. 90.

We are of the opinion that a right of action also accrues to an employee engaged upon a railroad train for injuries received without his own fault, by reason of the negligence of the corporation in failing to comply with the fencing statute. It has so been held,<sup>149</sup> under a similar statute, by the New York court of appeals: *Donnegan v. Erhardt*, 119 N. Y. 472.

2. It is said, in the next place, that the defective fence was not the direct and proximate cause of the accident. "The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. Proximity in point of time or space, however, is no part of the definition. That is of no importance, except as it may afford evidence for or against proximity of causation": 1 *Shearman and Redfield on Negligence*, 4th ed., sec. 26.

Under this definition there can be no doubt that negligence in failing to keep the fence in repair was the immediate cause of the obstruction of the track which in a natural and continuous sequence produced the derailment of the engine and consequent injury. Without the defective fence the derailment and injury would not have occurred. The negligence was clearly the direct cause of the injury.

3. It is further insisted that the negligence of deceased in disobeying the plain and positive rule of defendant which required that "freight trains must be under control when approaching and passing through all stations, and be prepared to stop, in case the track is obstructed," was also a

proximate cause of the injury which directly contributed thereto and which prevents a recovery.

It may be admitted that deceased was acting in violation of the rules of defendant at the time the engine collided with the bull, and was, in consequence, negligent, but we are unable to see any proximate and natural connection as a cause between this negligence and the derailment of the engine and injury and death of plaintiff's husband. Mere negligence without a <sup>151</sup> resulting damage can no more be pleaded as contributory negligence to defeat an action than it can be charged as an original cause of action. The connection as a producing cause must be made to appear in either case. "It must appear, in order to defeat the right of action that, but for the plaintiff's negligence operating as an efficient cause of the injury, in connection with the fault of the defendant, the injury would not have happened": Beach on Contributory Negligence, 2d ed., sec. 34.

It appears impliedly for the rule itself, and directly from the testimony of the superintendent and train-dispatcher of defendant, that the purpose of the rule was to avoid collisions, obstructions, and misplaced switches at stations. It appears further that the collision, which resulted in the derailment of the train, occurred near a thousand feet from the first switches of the station yards. It does not appear that the engine could, by the most diligent care, have been held under such control as could have prevented the collision after the danger appeared.

But it is said that the derailment did not occur immediately from the collision, but that the wheels ran safely on the ties until the switch was reached, the distance of near a thousand feet, and the engine was then thrown from the track by reason of coming into the switch in a derailed condition. We do not see how this circumstance changes or shifts the proximate cause of the accident from that of the collision with the bull to that of the violation of the rule in question, or how the disregard of the rule became a direct and contributing cause of the injury. There was no intervening cause between the collision and the final disaster, except the contact with the switches, which there is no pretense that deceased could have avoided. We can speculate and theorize as we may as to what course of <sup>151</sup> conduct might have avoided the disaster, but the fact remains that the direct cause was the obstruction of the track, which was

brought about by the negligence of defendant and the consequences of which could not have been avoided by any degree of care deceased could have exercised. What might have been the result had the rule been observed is mere speculation.

Again, it is argued that deceased was negligent in remaining on the engine, while running a thousand feet with two wheels off the rails. This contention is untenable for two reasons: 1. Because it does not appear from the evidence that the course adopted by deceased was not the safest and most prudent in the circumstances; and 2. When suddenly exposed to great and imminent danger he was not expected to act with that degree of prudence and wisdom which would otherwise have been required of him.

The evidence shows that deceased, as soon as he had reversed his engine, sounded the alarm, and put on the air-brakes, got out of the cab onto the running-board and steam-chest, where he remained until the engine was overturned. According to the evidence, he thus assumed the safest position he could have taken. The evidence further shows that, when an engine is running rapidly with two of its wheels off the rails, and jumping from tie to tie, it pitches and jars to such a degree that it is exceedingly difficult and dangerous to jump therefrom. One witness, an engineer, in testifying as to his own experience in riding an engine under similar circumstances, stated: "It was impossible to jump. The jar of the engine riding the ties was such that a man had no control of himself. If he jumped he would fall under. He would have no use of his limbs at all. I could not gather for a spring."

With this evidence we could not say that deceased was negligent in remaining on the engine. Nor can we <sup>152</sup> say, in the circumstances, that he would have been chargeable with negligence, though he did not adopt the safest and best course to avoid injury: *Adams v. Hannibal etc. R. R. Co.*, 74 Mo. 553; 41 Am. Rep. 333; *Siegrist v. Arnot*, 86 Mo. 208; 56 Am. Rep. 424.

This disposes of the questions raised on the demurrer to the evidence, as well as to complaints made to the rulings of the court in giving and refusing certain instructions.

5. Complaint is made to the refusal of the court to give the following instruction requested by defendant: "The jury are instructed that, if the defect or bad condition of the fence,

whereby the bull came upon the track, was known to Dickson as well as to the company, there can be no recovery in this case unless the evidence shows, and the jury believe, that Dickson notified the company of such defect in the fence, and was induced to remain in the company's employment by its promise that the fences should be repaired."

The instruction evidently intended to inform the jury as to the risks deceased assumed, in case he knew of the defective fence and continued to run trains over the road without objection. But we think the instruction, as asked, was misleading and did not properly declare the law, in that it required the jury to find, as a fact, that the defect in the fence was known to deceased "as well as to the company." The language is susceptible of the interpretation that deceased was under the same obligation to inspect and ascertain existing defects as was required of the corporation. There was no positive proof that either Dickson or defendant had actual knowledge of the defects. It was the duty of the defendant to use reasonable care, by proper inspection, to ascertain whether defects existed. This duty, from the situation of the fence with respect to the track and from the nature of the employment <sup>153</sup> and duty of an engineer, could not justly have been required of deceased. A proper and careful discharge of his duty required constant watchfulness of the machinery he was operating, and of the track before him, and the rapidity of his movement made it impossible to examine into the condition of fencing fifty feet away, though he had time and opportunity to do it.

We think deceased could not have been chargeable with notice of the defect, unless it had been shown that such defects were so common and apparent that they could not have escaped his observation while properly attending to his business. It could not be said of him, as of the master, that he would be chargeable with knowledge, if he could have known by the exercise of due care. Before he can be charged with having assumed risks of injury from defects in fences it was necessary to have shown that he had knowledge of them; but knowledge may have been inferred by the jury, from the nature of the defects and the opportunity for observation.

The instruction, as asked, was improper, and the court was not required, as in criminal cases, to correct it, or give a proper one on the question intended to be covered.

No error being shown, the judgment is affirmed.

All concur.

**MASTER AND SERVANT—PLACE TO WORK.**—A master is bound to furnish his servants a reasonably safe place in which to work: See note to *Elledge v. National City etc. Ry. Co.*, 38 Am. St. Rep. 296; *Lobby v. Scherman*, 146 Ill. 540; 37 Am. St. Rep. 191. This rule applies to a railroad company: *Ragon v. Toledo etc. Ry. Co.*, 97 Mich. 265; 37 Am. St. Rep. 236.

**NEGLIGENCE.—PROXIMATE CAUSE** is one which in actual sequence, undisturbed by any independent cause, produces the result complained of: *Behlring v. Southwest etc. Lines*, 160 Pa. St. 359; 40 Am. St. Rep. 724. It must be that cause without which the result would not have occurred: *Western Railway v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179. It is the efficient cause—the one that necessarily sets the other causes in operation. Causes that are merely incidental, or instruments of a superior or controlling agency, are not the proximate causes, though they may be nearer in time and more immediate to the result: *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 251. To hold a party liable for negligence there must be a causal connection between the injury and the negligence, and such causal connection must be uninterrupted by the interposition of any independent human agency: *Curtin v. Somerset*, 140 Pa. St. 70; 23 Am. St. Rep. 220; *Bunting v. Hogsett*, 139 Pa. St. 363; 23 Am. St. Rep. 192. The test by which the line is to be drawn between proximate and remote cause is whether or not the facts constitute a continuous succession of events, so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the negligence. In the first instance liability attaches; in the latter it does not: *Haverly v. State Line etc. R. R. Co.*, 135 Pa. St. 50; 20 Am. St. Rep. 843. The injury must be the natural and probable consequence of the negligence. The immediate, and not the remote, cause of injury is to be considered, and this rule is not to be controlled by time or distance, but by the succession of events: *West Mahonoy Township v. Watson*, 116 Pa. St. 344; 2 Am. St. Rep. 604. The subject of proximate and remote cause is discussed at length in a monographic note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807-861.

**NEGLIGENCE.—SUDDEN DANGER.**—The law does not require that one who is surprised and confused by a sudden danger should act according to any fixed rule: Note to *St. Louis etc. Ry. Co. v. Murray*, 29 Am. St. Rep. 39.

**NEGLIGENCE.—RAILROADS—HIGH RATE OF SPEED.**—The general rule is that negligence cannot be inferred from the rate of speed alone at which railway trains are run: Note to *McDonald v. International etc. Ry. Co.*, 40 Am. St. Rep. 817.



## RUHE v. BUCK.

[124 MISSOURI, 178.]

**CONFLICT OF LAWS—LAW OF PERFORMANCE—LAW OF REMEDY.**—Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place of its execution. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought.

**CONFLICT OF LAWS—SUIT BY NONRESIDENT AGAINST MARRIED WOMAN—REMEDY—LEX FORI.**—A nonresident creditor suing a married woman in this state is entitled to such remedies only as are afforded by the *lex fori*. Prior to the Missouri revision of 1889 a married woman was not subject, in that state, to the process of attachment. Hence, a nonresident creditor could not proceed against her by attachment for a debt contracted by her in another state prior to that time.

*Lewis & Ramsay*, for the appellant.

*Hunt & Bailey*, for the respondents.

1883 GANTT, P. J. This record presents this case. At the time of the transactions involved a married woman in Missouri was incompetent to make a valid contract at law. At that time, however, she was authorized by the laws of Dakota to contract as a *feme sole*, and sue and be sued as such.

Mrs. Buck, the wife of O. W. Buck, became the purchaser of a city lot in Tarkio, Missouri, and held a bond for title from Perkins, the owner, until a balance of the purchase money should be paid.

Under the firm name of O. W. Buck & Co., Mrs. Buck and her husband became indebted in Dakota, and the interest of herself and her husband in 1883 said lot was attached for said debt in an action commenced in the circuit court of Atchison county, Missouri. After this attachment was levied on the lot Mrs. Buck sold the lot to Thompson & Trout, who afterward paid the balance of the purchase money to Perkins, and received a warranty deed from Perkins, which was recorded.

That a married woman was not subject to a suit by attachment in Missouri prior to 1889 was decided by this court in *Gage v. Gates*, 62 Mo. 412, and that a judgment obtained against her in such a proceeding was a nullity was repeated in *Lincoln v. Rowe*, 64 Mo. 138, and that she could not be sued as a member of a mercantile firm at law was also settled in *Weil v. Simmons*, 66 Mo. 617.

From these and many other decisions it would appear that no resident creditor could proceed by an attachment at law against a married woman in this state, for a debt contracted in this state, and this record presents the question whether our laws will give nonresident creditors remedies to collect their claims against a married woman in this state which we uniformly deny to our own citizens.

The supreme court of the United States, in *Scudder v. Union Nat. Bank*, 91 U. S. 406, sums up the general principle in a few words: "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought."

So that while we concede that, by the laws of Dakota, Mrs. Buck could enter into a contract of <sup>184</sup> partnership with her husband and become bound for the debts of that partnership, the question remains, When the creditors sue her in this state, are they bound to take such remedies, and such only, as our laws offer against a married woman, for such she remains, notwithstanding her capacity to contract and sue and be sued, or are we bound to treat her as a single person? Judge Story, in his treatise on the Conflict of Laws, eighth edition, section 556, says: "Having stated these general principles in relation to jurisdiction (the result of which is that no nation can rightfully claim to exercise it, except as to persons and property within its own domains), we are next led to the consideration of the question, in what manner suits arising from foreign causes are to be instituted and proceedings to be had until the final judgment. Are they to be according to the law of the place where the parties, or either of them, live? Or are they to be according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought? Fortunately here there is scarcely any ground left open for controversy, either at the common law or in the opinions of foreign jurists, or in the actual practice of nations. It is universally admitted and established that the forms of remedies and modes of proceeding and the execution of judgments are to be regulated solely

and exclusively by the laws of the place where the action is instituted, or . . . according to the *lex fori*."

This principle has been illustrated in many ways. Thus in *Williams v. Haines*, 27 Iowa, 251, 1 Am. Rep. 268, the supreme court of Iowa, in an opinion of Chief Justice Dillon, held, in an action on a sealed instrument executed in Maryland that, although, by the laws of Maryland, the consideration could not be inquired into, yet, as the Iowa statutes provided that "the want or failure in <sup>185</sup> whole or in part of the consideration of a written contract might be shown as a defense," and "the addition of a private seal . . . should not affect its character in any respect," the consideration could be impeached in an action in Iowa. Said the court: "The plaintiff must take such remedy as our laws afford him. He has not a vested right in the courts of other states to all the common-law incident of contracts, provided the obligation of the contract be not impaired." The courts of Iowa "must administer its own laws and not those of other states." In *Mathuson v. Crawford*, 4 McLean, 540, judgment was rendered in Indiana on a note executed in Ohio. The laws of Indiana required an appraisement of lands before a sale on execution, and that no lands should be sold for less than one-half of their appraised value, but the sheriff sold without regard to the valuation laws. The question was, whether the sale was void for failure to comply with the Indiana law. The contention was that, as the contract was made in Ohio, its laws should control and not those of Indiana. Discussing the proposition that the remedy existing in the state where the contract was made constituted an essential part of it, Mr. Justice McLean said: "It is impracticable and cannot be enforced. . . . In the present case the laws of Ohio cannot be recognized in Indiana, in giving a different remedy from the existing laws here. No difficulties arise in giving effect, in any state, to what is properly called the law of the contract, in contradistinction to the law of the remedy. In the case before us the note was given to a firm in Cincinnati, and payment was to be made there. We look to Ohio for the rate of interest, . . . demand . . . and protest and notice required by law of Ohio. But, <sup>186</sup> as the remedy has been sought in Indiana, the laws of Indiana must govern," as to the execution and sale.

So in *Mineral Point R. R. Co. v. Barron*, 83 Ill. 365, a garnishee proceeding was commenced against the company in

Illinois to recover wages due Barron. The company answered it owed Barron forty dollars, but set up that Barron was a resident of Wisconsin and the head of a family, and that by the laws of Wisconsin such wages were exempt. It was urged that, as Barron was a resident of Wisconsin and the debt was contracted in that state, the exemption laws of Wisconsin should control; but the supreme court of Illinois held that this law merely affected the remedy when an action should be brought in Wisconsin and could not be invoked in Illinois, saying: "The remedy must be governed by the laws of the state where the action is instituted."

And in *Burchard v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 334, a married woman signed the note of her husband in New York and bound her separate estate by an express agreement to that effect. It had previously been ruled that upon this equitable charge the laws of New York permitted a judgment at law, without indicating any property out of which it was to be satisfied: *Corn Exchange Ins. Co. v. Babcock*, 42 N. Y. 613; 1 Am. Rep. 601. An action was brought on this note in Illinois, and the circuit court held, on the authority of the New York decision last cited, that the note was valid and binding at law in New York, and that it could be enforced as such in Illinois, but the supreme court of Illinois held that it did not follow that, because the remedy was an action at law in New York, it would be the same in Illinois, Judge Scholfeld saying: 'But the law of the remedy is no part of the contract': *Wood v. Child*, 20 Ill. 209. 'When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the <sup>187</sup> *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, the mode, and the extent of the remedy': *Sherman v. Gassett*, 4 Gilm. 531; *Chenot v. Lefevre*, 3 Gilm. 643.

"That appellant charged her separate estate with the payment of the amount of the note, by the law of New York, is beyond question. . . . But this is in equity only; and, although by our present statutes . . . married women may sue and be sued, either with or without joining their husbands, and defend without regard to whether the husband shall defend or not, and judgments may be recovered against them, . . . we still preserve the distinction between actions at law and suits in equity; and there is no authority [in Illi-

nois] for suing and obtaining judgments against them in actions at law on purely equitable liabilities."

It will be observed that, though the wife's contract was a binding obligation and she could be sued at law by the *lex loci*, and, although, by the laws of the forum, she could be sued with or without joining her husband, still the plaintiff was given such remedy only, to wit, a suit in equity, as the law of the forum afforded in such a case, irrespective of the *lex loci*.

In the case at bar it is argued that, had her undertaking in New York been good at law, she could have been sued at law in Illinois; so she could, but it would have been so because the law of the forum gave that right; but, as we have seen, the law of Missouri denied the right to attach a married woman prior to the revision of 1889.

In *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, the question was whether a contract made in Maine by a married woman domiciled in Massachusetts, which a married woman was not at the time capable of making under the laws of Massachusetts, but was then allowed by the <sup>188</sup> law of Maine, and which she could lawfully make in Massachusetts, at the time of the suit, could be enforced in the courts of Massachusetts. And the supreme court of Massachusetts answered in the affirmative, placing the decision, however, on the comity of states and that the contract, in view of the subsequent enabling act of Massachusetts, was not contrary to the policy of that state.

As the contract was valid by the *lex loci* and as the *lex fori* afforded a remedy at the commencement of the suit there would seem to be no doubt of the soundness of that decision; but if the law of Massachusetts had up to that time regarded the contracts of married women as utterly void at law, and had not permitted them to sue or to be sued, it would seem a different conclusion would have been attained, judging from the intimation of the distinguished jurist, Mr. Justice Gray, that it was possible "that in a state where a common law prevailed in full force by which a married woman was deemed incapable of binding herself by any contract whatever it might be inferred that such an utter incapacity, lasting throughout the joint lives of husband and wife, must be considered as so fixed by the settled policy of the state, for the protection of its own citizens, that it could not be held by the courts of that state to yield to the law of another state in

which she might undertake to contract." The case supposed by Judge Gray is this case in fact.

By the law of this state Mrs. Buck's contract would have been absolutely void at law and no action could have been maintained thereon in our courts, and such was the long established policy of this state, and, unlike Massachusetts, she had not relaxed this rule prior to and at the time this attachment was levied.

Is this state required, out of a spirit of comity, to award a nonresident a remedy at war with her own <sup>189</sup> policy, and one which she constantly denied to her own citizens? The supreme court of Rhode Island, in *Hayden v. Stone*, 13 R. I. 106, answered in the negative. That the law of the forum governs as to remedies in the enforcement of contracts, see, also, *Pickering v. Fisk*, 6 Vt. 102; *Commercial Nat. Bank v. Chicago etc. Ry. Co.*, 45 Wis. 172; *Leiber v. Union Pac. Ry. Co.*, 49 Iowa, 688; *Denny v. Faulkner*, 22 Kan. 89; *Green v. Van Buskirk*, 5 Wall. 307; Wharton on Conflict of Laws, sec. 121; *Bank of United States v. Donnally*, 8 Pet. 362; *Laird v. Hodges*, 26 Ark. 356.

A case very similar to this arose in Illinois. An action at law was brought against a married woman. She pleaded coverture at the time of making the contract and the commencement of the action. Reply, contract good by the laws of Iowa where it was made and a liability to suit as a *feme sole* in that state. Discussing the sufficiency of this reply the supreme court of Illinois said: "A party seeking to enforce a contract valid by the laws of another state must avail of the remedy provided by our laws. . . . That part of the replications which alleges that, by the laws of the state of Iowa, a married woman could be sued alone on contracts concerning her separate property did present an immaterial issue," but, because by the laws of Illinois she could be sued alone, it was held that enough remained to make a good replication: *Halley v. Ball*, 66 Ill. 250.

A different conclusion was reached in *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690. Although the court recognized the rule already stated in these words: "Under this rule we act in requiring the husband to be a party defendant with the wife, as was done in the case at bar. While under the laws of Kentucky this married woman has had her disabilities removed, and can contract, sue, and be sued as a *feme sole*, we recognize and enforce in this state

[Tennessee] so much of the foreign law as <sup>190</sup> determines and fixes her liability, in other words the law of the contract; but, in enforcing such liability in the courts of this state, if she is plaintiff, she must sue by next friend or with her husband, and, as defendant, her husband must be joined with her as a party."

In other words, her status as a married woman by the laws of Tennessee still remained, and the remedies there given against a married woman controlled. That was a proceeding in a chancery court, and we are not sufficiently advised of the practice in that state to draw any conclusion as to its persuasiveness as an authority for the practice here invoked. The general principle announced is in harmony with the rule heretofore deduced.

In *Gibson v. Sublett*, 82 Ky. 596, the supreme court of Kentucky held a married woman personally liable in Kentucky on a note executed in Louisiana, although, if she had made the note in Kentucky, her promise would have been void. The reasons for this decision are tersely stated by the court. They say: "And if, by the law of the place of the domicile of the husband, a married woman has the capacity to sue, or to make a contract, or to ratify an act, her acts so done will be held valid everywhere: Story's Conflict of Laws, sec. 66 a. If, then, the contract is to be held valid and binding here, because it is so in the state where it was made, it would seem to reasonably follow that her property here should be subject. For, to hold that a valid and binding contract is not enforceable at any time, nor in any manner, is absurd," and the court consequently held, "that the remedy provided for the satisfaction of judgments [in Kentucky] should be applied as though the judgment was against a *feme sole*."

Entertaining, as we do, the highest respect for the court that decided this case, we do not think its reasoning convincing in that case. In our opinion, it has <sup>191</sup> mingled the "*lex loci contractus*" with the "*lex fori*," which are distinct in their nature and obligation, and treats them as one. We do not think that many other courts have gone so far. The rule which recognizes the binding force of the contract where made has never gone to the extent of attaching to it the local remedies and carrying them into another jurisdiction, but it is left to each nation and state to enforce such a contract according to its own laws.

As already said, when this action was brought, this court

had, by uniform decisions, held that a married woman could not be sued by attachment in actions at law in Missouri. No such remedy was available in our courts in favor of resident creditors. Had any citizen of Missouri, on a contract made or to be performed in this state, proceeded by attachment at law against this real estate no lien would have been created, and no valid judgment could have been rendered against Mrs. Buck, and no purchaser for value would have been affected, but, if plaintiff's contention is true, the fact that this claim originated in Dakota has changed all this, and his attachment is as valid as if Mrs. Buck was a single woman. But Mrs. Buck is still a married woman, and there was no such exception in our code of procedure in favor of contracts executed beyond our borders when this suit was brought, and an attempt to enforce such a distinction out of a spirit of comity would create endless confusion. A purchaser's rights ought not to depend upon the accidental circumstance of the place of the execution of the contract upon which the judgment is based.

Our courts administer justice without distinction, according to the modes prescribed by the state, and those who seek them must take such remedies as are prescribed.

<sup>193</sup> An infant's contract may be good in Illinois, but, if he is sued in Missouri, he is proceeded against as an infant by next friend or guardian. His status for the purposes of the action is determined by our laws in force when the suit is brought.

It follows that the circuit court properly held that the proceedings by attachment against Mrs. Buck were void, and hence presented no obstacle to the purchase by Trout & Thompson, and its judgment is affirmed.

BURGESS, J., concurs.

SHERWOOD, J., dissents. —

SHERWOOD, J., dissented in this case. He cited various sections of Story on Conflict of Laws, *Gibson v. Sublett*, 82 Ky. 596, *Robinson v. Queen*, 87 Tenn. 445, 10 Am. St. Rep. 690, *Burchard v. Dunbar*, 82 Ill. 450, 25 Am. Rep. 334, *Hayden v. Stone*, 13 R. I. 106, and *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241, which authorities, it will be observed, are also cited in the majority opinion; and yet he concluded that Mrs. Buck could be sued in Missouri as a nonresident, and her lands attached to satisfy a judgment debt, thus violating that principle of comity by which courts are governed, namely, that they will not allow a remedy to a foreign suitor that they deny to their own citizens. He made the point that Mrs. Buck, as to the contracts which



resulted in the Dakota judgments, occupied the attitude before the court of a *feme sole*, suable as such in every point and particular as if she were discovert; and that the laws of Missouri, which did not admit a recovery of a personal judgment against a *feme covert* in an action at law, were not applicable, and not intended to apply to such a case. But suppose that Mrs. Buck was a *feme sole* before the Missouri court, and which may be admitted to have been true, she still occupied the same status as any other defendant whose contract was made beyond the borders of Missouri. His honor agreed with the majority of the court that the contract was to be construed according to the *lex loci contractus*, and that the *lex fori* should apply as to the remedy; but, he added, "the *lex fori* applies the remedy in accordance with the legal status of the party sued, as previously determined by the law of the place of the contract." If he meant by this that the courts of one state will, in enforcing contracts made in another, adopt and enforce the remedies of the latter, it is clearly error, as courts do not enforce any kind of a contract according to foreign remedies. Suits arising from foreign causes are to be instituted, and proceedings had, until the final judgment, according to the modes of proceeding and forms of suit prescribed by the laws of the place where the suits are brought. "The reasons for this doctrine are so obvious," says Story in his work on Conflict of Laws, eighth edition, section 557, "that they scarcely require any illustration. The business of the administration of justice by any nation is, in a peculiar and emphatic sense, a part of its public right and duty. Each nation is at liberty to adopt such forms, and such a course of proceeding, as best comport with its convenience and interests, and the interests of its own subjects, for whom its laws are particularly designed. The different kinds of remedies, and the modes of proceeding best adapted to enforce rights, and guard against wrongs in any nation, must materially depend upon the structure of its own jurisprudence. What would be well adapted to the jurisprudence, either customary or positive, of one nation for rights which it recognized, or for duties which it enforced, or for wrongs which it redressed, might be wholly unfit for that of another nation, either as having gross defects, or steering wide of the appropriate remedial justice. A nation acknowledging the existence of peculiar rights and privileges, either personal or real, such as seigniorial rights or trusts in the realty, would naturally introduce correspondent remedies. While other nations, in which such rights and privileges and trusts did not exist, might well dispense with the formalities which they might require. The jurisprudence of one nation may be very refined and artificial, with a multitude of intricate and perplexed proceedings; that of another may be rude, uninformed, and harsh, consisting of an undigested mass of usages. It would be absolutely impracticable to apply the process and modes of proceeding of the one nation to the other. Besides, there would be an utter confusion in all judicial proceedings by attempting to ingraft upon the remedies of one country those of all other countries whose subjects should be parties or be interested therein. No tribunal on earth, however learned, could hope, by any degree of diligence, to master the laws and processes and remedies of all other nations, and the qualifications and limitations properly belonging thereto. A whole life might be passed in obtaining little more than a few unconnected elements; and litigation would thus become immeasurably complicated, if not absolutely interminable. All that any nation can therefore be justly required to do is to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own sub-

jects, and to give them the same redress, as to rights and wrongs, which it deems fit to acknowledge in its own municipal codes for natives and residents": Compare *Mathuson v. Crawsford*, 4 McLean, 540, affirming the same principles. In addition to this, his honor starts out with the fact that the land attached was situated in the town of Tarkio, Missouri, but says nothing in his dissenting opinion about the *lex rei sitæ*; and it is well settled that questions relating to real property are governed by the law of the *situs*: See note *infra*. It seems quite plain that the dissenting judge fell into error, and that the majority opinion is based upon sound principles.

**ASSERTING AGAINST A MARRIED WOMAN A LIABILITY TO WHICH SHE IS SUBJECT IN THE STATE WHERE IT WAS CREATED, BUT NOT IN THE STATE WHERE SHE IS SUED.**—It is obvious that the question of enforcing a married woman's obligation in a foreign jurisdiction involves questions as to the conflict of laws. Foreign laws having no extraterritorial operation are administered in a spirit of comity; but that comity is, and ever must be, uncertain. Many great writers and distinguished judges have attempted to define and fix its principles, but it appears to have been an effort to define and fix that which cannot, in the nature of things, be defined and fixed. The result has been a bewildering conflict of decisions which cannot be averted. "Comity of nations must necessarily depend," says Porter, J., in *Saul v. His Creditors*, 8 Martin, N. S., 678, "on a variety of circumstances, which cannot be reduced within any certain rule. No nation will suffer the laws of another to interfere with her own, to the injury of her citizens; and whether they do or not must depend on the condition of the country in which the foreign law is sought to be enforced, the particular nature of her legislation, her policy, and the character of her institutions." He also said "that in the conflict of laws it must be often a matter of doubt which should prevail, and that whenever that doubt does exist the court which decides will prefer the law of its own country to that of the stranger." In dealing with cases involving a conflict of law the courts have, however, laid down and adhered to a few well-defined general principles, which serve a good purpose in helping to solve complications as they arise.

**LAW OF PLACE OF CONTRACT.**—Thus, it is well settled that matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made: *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672, note; *Richardson v. De Giverville*, 107 Mo. 422; 23 Am. St. Rep. 426, and note; *Curnow v. Phoenix Ins. Co.*, 37 S. C. 406; 34 Am. St. Rep. 766, and note; *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186, and note; *China Mut. Ins. Co. v. Force*, 142 N. Y. 90; 40 Am. St. Rep. 576. And this rule applies to the contract of a married woman when it is sought to be enforced in a state outside of that in which it was made; the principle being that if a contract is valid where it is made it is valid everywhere: *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690; *Bank of Louisiana v. Williams*, 46 Miss. 618; 12 Am. Rep. 319; *Miliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; *Holmes v. Reynolds*, 55 Vt. 39; *Kelly v. Davis*, 28 La. Ann. 773; *Wright v. Remington*, 41 N. J. L. 48; 32 Am. Rep. 180; *Bond v. Cummings*, 70 Me. 125; *Hochstatter v. Hays*, 11 Col. 118; *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251; *Taylor v. Sharp*, 108 N. C. 377; *Merrielles v. State Bank*, 5 Tex. Civ. App. 483; *Withers v. Sparrow*, 66 N. C. 129, 138; *Nixon v. Halley*, 78 Ill. 611. For example, a woman and her husband were domiciled in New York. He went into Connecticut, where she signed her

name to an accommodation note, dated and payable in Connecticut to the order of a firm of which he was a partner. He took the note to New York, and there had it discounted, and received the money. In an action on the note the question was whether the wife was liable. The laws of Connecticut did not authorize a married woman to contract, except for the benefit of herself, her family, or her separate or joint estate. It was held that the note had no inception until it was delivered to the plaintiffs; that the contract was therefore made in New York, and was governed by its laws, and not by those of Connecticut; and that the wife was liable upon the note, although she would not have been had the contract been made in Connecticut. Both domicile and place of contract were in New York: *Voigt v. Brown*, 42 Hun, 394. Again, a promissory note written in this state, but signed in another, by a husband and wife living there, and returned by mail to the payee in this state, is a note made in this state, and is to be construed by the laws thereof. Hence, if the note was signed by the wife as surety for her husband, and the laws of the other state did not allow her to so bind herself there, the note is to be construed by the laws of this state, where they authorize her to contract for any lawful purpose: *Bell v. Packard*, 69 Me. 105; 31 Am. Rep. 251. It is true that in the two illustrations just given the wife was liable in the jurisdiction where suit was brought, but such a coincidence rarely occurs, where acts have been performed by her in one state and suit is brought against her in another. Ordinarily, if her contract is made in one state and suit is brought upon it in the same state, no question as to conflict of laws arises; and where such a question does arise the action is generally brought in one state upon her contract made in another state. If the laws of another state authorize a married woman to make contracts, and bind herself for services and labor performed, at her request, upon property in her possession there, and she does make such a contract there, it may be enforced against her in this state: *Nixon v. Halley*, 78 Ill. 611. The *lex domicilii* is sometimes to be considered in connection with the *lex loci contractus* in construing the effect of a married woman's contract, and, so far as they are in conflict, the law of the place of the contract must prevail. Thus, in *Pearl v. Hansborough*, 9 Humph. 426, certain slaves were given and conveyed by a father, a citizen of Tennessee, in consideration of natural love and affection and one hundred dollars, to his married daughter, who with her husband resided in Mississippi. The slaves being left in Tennessee were attached there by creditors of the husband as his property. There was a controversy as to whether the transfer was a gift or a sale. Under the laws of Mississippi the wife was capable of taking property by gift or purchase to her own separate use, but under the laws of Tennessee she was incapable of contracting, and her contracts were void. It was held that, if the conveyance was a gift, the wife took free from the claim of the husband's creditors, under the law of her domicile; that, if the conveyance was a sale, the contract being made in Tennessee, was void by the *lex loci contractus*; and that, in either event, the creditors of the husband could take nothing. If the contract is invalid where it is made it is of course invalid everywhere. Thus, a married woman living with her husband in New Brunswick, and having no separate maintenance, purchased a horse of the husband, and subsequently moved into Maine with the property, where the horse was attached as the property of the husband. As the law of New Brunswick did not allow the wife, under such circumstances, to acquire title to personal property by purchase from the husband, it was held that the property was legally attached: *Bond v. Cummings*, 70 Me. 125.

**PLACE OF PERFORMANCE.**—It is also well established as a general principle, in conflict of laws, that matters connected with the performance of a contract are regulated by the law prevailing at the place of performance: *Baum v. Birchall*, 150 Pa. St. 164; 30 Am. St. Rep. 797; *Waverly Nat. Bank v. Hall*, 150 Pa. St. 466; 30 Am. St. Rep. 823, and note; and this applies to the contracts of married women. While the *lex loci contractus* generally governs as to the validity and construction of a contract, this is controlled by an agreement between the parties that some other state or country shall be the place of performance, especially where such agreement is made with special reference to the laws of such other place: *Bank of Louisiana v. Williams*, 46 Miss. 618; 12 Am. Rep. 319. Thus, a promissory note executed by a wife as surety for her husband, in a state where she resides, although void by the laws of that state, can be enforced against her land in another state, if she contracted with reference thereto and intended to charge it with the debt: *Frierson v. Williams*, 57 Miss. 451. Not only the character of an instrument as a contract, but the character of the subject matter is sometimes to be considered in construing an obligation as to place of performance. For instance, if a married woman signs in this state a bond and mortgage for the purchase price of real estate situated in another state, and delivery is made in the latter state, thus completing the execution of the instruments, and the papers show upon their face that they are to be performed in the other state, and where the land is situated, their validity, nature, obligation, and interpretation must be governed by the laws of the latter state, when brought in question here, not only upon the ground that the latter state is the place where the contract was made and is to be performed, but also because the instruments constitute a contract relating to real property, and which is to be governed by the *lex rei sitæ*. And if, according to the laws of that state, the wife is personally liable, notwithstanding her coverture, the courts, in passing upon the matter here, will secure to her the advantages, and enforce against her the obligations, of her contract in accordance with the laws of that state, notwithstanding her disability here: *Baum v. Birchall*, 150 Pa. St. 164; 30 Am. St. Rep. 797. The law of the place of performance does not in any way affect the capacity of a married woman to contract in a state which authorizes her to make contracts. Even the law of another state denying to her the capacity to make a contract there would not deprive her of the capacity of performing there a contract made by her here and valid under the laws of this state: *Voigt v. Brown*, 42 Hun, 394. As a contract made in one state and to be performed there is governed by the law of that state, it follows as a logical result that a defense or discharge, good by the law of the place where the contract is made or to be performed, is to be held, in most cases, of equal validity elsewhere: *Graham v. First Nat. Bank*, 84 N. Y. 393, 401; 38 Am. Rep. 528, 532.

**LEX REI SITÆ.**—The law of the *situs* conclusively governs as to all questions relating to rights, titles, and interests in and to real property: *Richardson v. De Giverville*, 107 Mo. 422; 28 Am. St. Rep. 426, and note; *Baum v. Birchall*, 150 Pa. St. 164; 30 Am. St. Rep. 797, and note; *Miller v. Wilson*, 146 Ill. 523; 37 Am. St. Rep. 186, and note. And this rule applies to the obligations of married women concerning realty: *Frierson v. Williams*, 57 Miss. 451. If the parties reside in another state, and make their contract there, their capacity to make the contract must be determined by the laws of that state; but its effect on real estate here, owned by the wife, must be controlled by the laws and policy of this state: *Kelly v. Davis*, 28

La. Ann. 773. This was a case where Davis was sued in Louisiana, and certain lots and houses in Vidalia, in that state, were attached as his property. The defendant and his wife were residents of Mississippi. Plaintiffs alleged that Davis was indebted to them; that he was a nonresident; and that he had made a fraudulent and simulated transfer of the said lots and improvements to his wife to defraud the petitioners. The defense was that the property attached belonged to the wife of the defendant; that she acquired it by purchase from her husband for nine thousand dollars, which was paid by crediting a judgment she held against him with that amount. She denied the plaintiffs' right to attack her sale in this mode, and alleged that she had obtained the judgment against her husband in Mississippi, in part payment whereof the sale was made to her. She prayed that the attachment might be set aside. By the laws of Mississippi any deed from a husband to his wife for her use was void as against creditors, who were such at the time of executing the deed. The record showed that, at the date of the transfer from Davis to his wife, he was the debtor of the plaintiffs, so that when the deed was executed the parties could not enter into such a contract. Furthermore, the wife contended that "full faith and credit" was due to her judgment; but the court held that the same effect must be given to the judgment in Louisiana that would be given to it in Mississippi. The judgment had been obtained by default, and was made final in contravention of a prohibitory law of Mississippi. The court, therefore, held that the judgment was void, because whatever is done in violation of a prohibitory law is null; that the contract, if valid in Louisiana, would be a *dation en paiement*; and that creditors would have the right to require her to prove the validity of her judgment. This she had not done and could not do. The attachment proceedings were therefore maintained. So, where a wife buys land here, but gives her note in another state for the purchase money, and a deed is given in the other state and a mortgage to secure the note, signed and acknowledged in that state, before a notary public, and afterward recorded in this state, and an action is brought upon the note here and for foreclosure, the plaintiffs are entitled to a judgment on the note, where the laws of the other state allowed the wife to bind herself by a note; but there can be no judgment for foreclosure, if the laws here require the husband's consent to his wife's contract affecting her property, and the mortgage is unaccompanied by the privy examination of the wife. She will hold the land here free from every lien on account of the alleged mortgage: *Wood v. Wheeler*, 111 N. C. 231. On the other hand, the right of a married woman, a resident of another state, to maintain an action in this state for the protection of her real property in this state, depends upon the statute of this state as to the rights of married women, and not upon the statutes of the other state: *Johnson v. Huber*, 34 Ill. App. 527. The principle of comity does not require a state to regard the laws of any other state, so far as they may affect contracts in relation to real estate situated in the former state: *Frierson v. Williams*, 57 Miss. 451, 464. While a wife's separate estate may be charged with expenditures for the benefit of her estate here, a court in this state will not charge her lands in another state with expenditures for the benefit of such lands: *Shacklett v. Polk*, 4 Heisk. 104; *Withers v. Sparrow*, 66 N. C. 129. The validity of a mortgage of real estate is to be determined by the law of the place where the property is situated. In *Swank v. Hufnagle*, 111 Ind. 453, a mortgage executed in Ohio by a married woman, as surety for another, upon land owned by her in Indiana, was held to be void under the Indiana statute of 1881.

**LAW OF REMEDY.**—It is the law that matters respecting the remedy, such as the bringing of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought. Measures of relief are administered through the law of the forum, through the local forms of action, rules of evidence, and rules of practice: *McAllister v. Smith*, 17 Ill. 328; 65 Am. Dec. 651, and collected cases in note thereto; *Seay v. Palmer*, 93 Ala. 381; 30 Am. St. Rep. 57, and note; and this rule applies in enforcing the obligations of married women. Thus, if a foreign creditor comes into this state and seeks compulsory payment of a debt made by a wife abroad, he must submit himself to the law of the forum for his remedy. He must consult the rules and regulations which govern courts here as to the form of the suit, according to the character of his "right." Our system determines whether he must sue at law or in chancery: *Bank of Louisiana v. Williams*, 46 Miss. 618; 12 Am. Rep. 319. The remedy provided by the law of the place where the contract is sought to be enforced must be pursued, and not that of the place where the contract was made; and, if the remedy provided by the *lex fori* is in a court of equity, suit must be so brought, although the remedy was at law in the place where the contract was made: *Halley v. Ball*, 68 Ill. 250. The same principle applies where a married woman is a suitor. If she is domiciled in another state, and by the laws thereof holds property to her separate use, she must, in seeking a remedy to recover for loss or injury thereto in this state, be governed by the laws thereof, and may bring an action in her own name, if our laws permit her to do so: *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429. In seeking to enforce the obligation of a contract against a married woman, made in another state, it will sometimes be found that there is no remedy against her personally, but that there is a remedy against her estate, the proceeding being *in rem*: *Bank of Louisiana v. Williams*, 46 Miss. 618; 12 Am. Rep. 319. In some of the states a married woman is, as to her separate estate, a *feme sole*; and, in an action to enforce her foreign contract against her, her power to make it and its validity must be governed by the laws of the forum: *Johnston v. Gaultrey*, 11 Mo. App. 322. In an action against a married woman to enforce against her, her obligation created in another state, although her husband has been made a party, she may enter an appearance to the action and contest the issue raised by herself, the same as if she were a *feme sole*, if the law of the forum allows her to make a defense: *Powers v. Totten*, 42 N. J. L. 442. In this case an attachment was issued against the defendant and her husband, founded on a promissory note made by them in which the plaintiff was the payee. The wife having alone entered an appearance to the action, the declaration was put in against her separately, and, upon her plea of the general issue, the cause went to trial. The note was made in New York, and, by the production of the statutes of that state, it was shown at the trial that the contract thus entered into by the defendant was a legal one, although, at the time, she was a *feme covert*. On the assumption that the contract was valid, the questions raised related to the regularity of the proceedings. On the part of the defendant it was urged that, as the cause of action arose in 1874, and was, prior to the existing law authorizing a separate suit against a married woman, on her contract, the procedure should have been conformed to the methods of the common law, and that, as a consequence, the verdict could not be sustained, being founded on an issue taken by a married woman in the absence of her husband from the record.

"In looking," said Beasley, C. J., "for the rules regulating the remedy

in this case, although the legality of the contract is dependent on the legal enactment of a foreign jurisdiction, it is the law of this state that is alone to be regarded. Matters of procedure are the creatures of domestic regulation. No question, therefore, can be made with respect to the proper mode of proceeding for the enforcement of the contract which underlies the present action. There is no statute in this state that authorizes a suit at law against a married woman without her husband being joined as a party, except upon contracts entered into by her since the passage of the present act relative to married women, which went into effect on the 1st of January, 1875. This was the express announcement of this court in the case of *Wilson v. Herbert*, 41 N. J. L. 455; 32 Am. Rep. 243. It would have been irregular, therefore, to have sued upon the note now in controversy in the courts of this state without the joinder of both husband and wife as parties defendant.

"But this principle does not have the reach necessary for the purposes of this defense. The husband, as well as the wife, was a party to this action; the attachment went against the two; and the result is, that the counsel of the defendant must satisfy the court, in order to sustain his position in any degree, that it was illegal for the wife to have her single appearance entered, and to plead to the issue in her own name. The inquiry is, then, she and her husband being parties to the writ of attachment, what is there in legal principles to prevent the wife from entering her appearance to the action and contesting the issue raised by herself in the same manner as though she were a *feme sole*? Suppose, on the return of this writ of attachment served on the property of the wife, the husband should refuse to enter an appearance, what, in such a juncture, would be the wife's remedy? It seems to me the inevitable answer is that, as the statutes have empowered a married woman to bind herself by contracts, on which an action at law will lie against herself, as well as against her husband, and in the progress of which action, if a judgment be obtained, her separate property becomes subject to it, she has conferred upon her, by necessary implication, every ability requisite for the defense of her rights.

"We cannot suppose that it was the legislative intent, when increasing the capacities of a married woman, to leave her well-nigh defenseless against suits growing out of her own contracts. In such situations, I cannot think that her protection is dependent solely on the caprice of her husband. In an action on an engagement entered into by a *feme covert* prior to the passage of the act now in force relative to married women I can have no doubt that, while the summons should have been issued against the husband as well as the wife, that, if the former should have refused or should have neglected to enter an appearance, the latter would have been permitted to defend such action in her own name, independently of her husband. The disabilities of the wife as a suitor depended, at common law, in a large measure, on her inability to act in other respects for herself. Her separate existence in court was not to be recognized, because she had no separate existence out of court. Her property passed into the hands of her husband, and her coverture prevented her from incurring legal obligations. Under such circumstances there was no necessity for her possessing a separate standing in court. But the act of 1862 changed this situation in all material respects. The married woman, under its terms, retained and could acquire property, and could impose legal obligations upon herself. It would seem, therefore, that, as the grounds of the old practice touching the litigious rights of this class of persons have been removed, the practice itself

must be considered to be removed. As a further illustration of the unwisdom of applying the former mode of procedure to existing affairs it is said, in the argument of counsel of the defendant—and cases in point are cited to sustain the position—that the appearance of the defendant by attorney was void, as a married woman could not appoint an attorney. Undoubtedly, this is the common-law rule, but how can such a rule be applied, when, by force of the statutes of this state, this defendant had as complete a right when she employed her attorney—the present act being then in force—to bind herself by any personal engagement, except such as relate to suretyship, as though she had never come under the coverture? There are few cases to which the axiom, '*Cessante ratione, cessat ipso iure*,' would seem more closely to apply." In Pennsylvania it is held that where a contract is made by a married woman in a state under the laws of which a recovery may be had thereon against her alone, without joining the husband, it is not necessary in a proceeding in a Pennsylvania court to enforce such judgment against her to join the husband as a codefendant: *Evans v. Cleary*, 125 Pa. St. 204; 11 Am. St. Rep. 886. In Rhode Island it is held that the husband must be joined: *Hayden v. Stone*, 13 R. I. 106.

**ENFORCEMENT OF MARRIED WOMAN'S OBLIGATION.**—Courts will enforce contracts valid by the laws of the state or country wherein they were made, unless they are clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which they are sought to be enforced: *Forepaugh v. Delaware etc. R. R. Co.*, 128 Pa. St. 217; 15 Am. St. Rep. 672, and note; *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553; 25 Am. St. Rep. 660, and note; *Wasserboehr v. Boulter*, 84 Me. 165; 30 Am. St. Rep. 344, and note; *Evans v. Beaver*, 50 Ohio St. 190; 40 Am. St. Rep. 666. No state or nation, however, is bound to recognize or enforce contracts which are injurious to its own interests, or the welfare of its people, or which are in fraud or violation of its own laws: *Wasserboehr v. Boulter*, 84 Me. 165; 30 Am. St. Rep. 344; *Security Co. v. Byer*, 36 Neb. 507; 38 Am. St. Rep. 735, and note. "The well-settled principle of interstate comity," says Clapton, J., in *Seay v. Palmer*, 93 Ala. 381; 30 Am. St. Rep. 57, "that the validity, interpretation, and obligatory force of contracts depend on the law of the place where made, being also the place of performance, and will be accordingly enforced by the courts of other states, if not repugnant to their laws and policy, applies to such parts of the contract as are of the essence of the personal liability and obligation, which determine and regulate the rights of the parties. But, as to such portions of the contract as pertain to and affect the remedy, the principle is applicable, that all matters pertaining to the remedy, and the proper course of enforcing the contract, are determinable by the law of the place where the suit is brought; for the courts will not enforce such part of a contract as limits, modifies, or enlarges the remedy, any more than they will enforce the remedial statutes of another state." And, "it would be extending the rule of comity beyond all reasonable limits," says Cooper, J., in *American etc. Mortgage Co. v. Jefferson*, 69 Miss. 770, 30 Am. St. Rep. 587, "if the courts of this state should afford relief against an agreement made in another state, and to a nonresident complainant, under a state of facts in which, if the controversy was between our own citizens and in relation to a transaction occurring here, relief would be denied."

And these principles are applicable to cases in which it is sought to enforce the contracts or obligations of a married woman. Thus, if the statutes of one state empower her to sign a note as surety for her husband's



debt, such a contract will be enforced against her in another state, where it is not considered to be in conflict with the general interest of the citizens of the latter state, or its public policy: *Wright v. Remington*, 41 N. J. L. 48; 32 Am. Rep. 180. In *Hayden v. Stone*, 13 R. L. 106, however, a husband and wife executed a note in Massachusetts, which was a good contract in that state. Suit was brought upon it in Rhode Island, and the property of the defendants attached. The wife could not make a valid note in the latter state. The court held that the action could not be maintained against her on the ground that they would not allow the foreign law to be intruded or to interfere with the laws of that state on the subject of property rights. And, if the laws of another state authorize her to bind herself by a note, and she makes such a contract there, it will be enforced here, although she could not so obligate herself in this state: *Gibson v. Sublett*, 82 Ky. 596; *Robinson v. Queen*, 87 Tenn. 445; 10 Am. St. Rep. 690. Even where the husband executed a note with her in the foreign jurisdiction the court here, after personal service of process, has jurisdiction of an action to recover the sum alleged to be due thereon, and the existence of the relationship of husband and wife between the defendants will not prevent a judgment against the wife: *Taylor v. Sharp*, 108 N. C. 377; *Gibson v. Sublett*, 82 Ky. 596; and the wife's liability may be enforced against her separate property in this state, after judgment against her upon a note made in another state: *Merritts v. State Bank*, 5 Tex. Civ. App. 483; *Gibson v. Sublett*, 82 Ky. 596. If the wife makes a note as surety for her husband in another state where she resides the contract can be enforced against her land in this state, although the note would be void by the laws of this state, if the wife contracted with reference to the land here, and intended to charge it with the debt: *Frierson v. Williams*, 87 Minn. 451. It must be observed, however, that cases like the above proceed upon the assumption or proof that the common-law disabilities of the wife have been removed and that she is clothed with a general power of contracting, the same as a *feme sole*, in the state where the contract was made. If this is not so, and she has no power there to bind herself personally, as on a promissory note, no recovery can be had on it here, particularly if her note, if given in this state, would be void, as at common law: *Spearman v. Ward*, 114 Pa. St. 634. And this is clearly true where the contract of the wife in the other state was that her separate estate should be charged, but that no personal liability should be incurred by her. In such a case she is not suable at law in this state: *Bradley v. Johnson*, 46 N. J. L. 271. This was an action on a bond made by the wife. It is plain that if the common-law disabilities of a married woman in this state have not been removed, and there is consequently no remedy against her personally, her contract made by her while temporarily abroad in another state cannot be enforced against her personally in the courts of the state, although the contract was valid according to the laws of the state in which it was made: *Armstrong v. Best*, 112 N. C. 59; 34 Am. St. Rep. 473. This was a case where goods were purchased on credit by the wife in another state, and suit was brought in North Carolina, but the court said, "the enforcement of the present contract is wholly repugnant to our domestic policy, as well as prejudicial to the interests of our citizens." In states where the common-law disabilities of a married woman have not been removed she cannot be sued upon a contract made in another state, though valid in the latter state unless she has separate property in the state where she is sued, as no personal judgment can be rendered against her: *Ritch v. Hyatt*, 3 McArthur, 536, a case where the wife gave a joint and several

bond for real estate purchased in the city of New York. In *Bank of Louisiana v. Williams*, 46 Miss. 618, 12 Am. Rep. 319, a husband and wife were sued in Mississippi upon a note made by them in Louisiana, and secured by a mortgage on property situated in the latter state. Mrs. Williams pleaded her coverture, and that she was, at the date of the contract, and had since been, a resident of Mississippi. The bank relied upon the fact that its charter authorized a married woman, jointly with her husband, to make this sort of a contract. The court, in concluding that Mrs. Williams was not bound, said: "The transaction stands upon ground local to Louisiana, and a policy there which is exceptional from the general rule and general law. Assuming, as a doctrine of the law, that the contract of a married woman, valid at the place where made, shall be so regarded everywhere, does that embrace an obligation incurred by her, growing out of special circumstances, and not included in the general law and policy of the place, but resting altogether on special reasons, and looking to local property for its payment? If, by the law of Louisiana, a married woman was competent to incur debts generally, and coverture imposed no disability, it would be a different question from that we are dealing with. If a married woman resident here, while temporarily in that state, should incur a debt and courts should be appealed to to enforce it, comity might enjoin the duty of a remedy, if our system could provide one. But we would be under no duty to give a 'personal judgment,' if such a proceeding had no place in our jurisprudence. The utmost that we could do would be to lay hold of her property here and apply it, provided in so doing we did no violence to the essential conditions and tenure by which she held it. If she contracts a debt in Louisiana, or at home, she charges it upon her estate here, unless the terms upon which the estate rests and is held forbid it. It matters not whether the suit be at law or in equity, whether the property be unconditionally hers at the marriage, or come to her by descent or devise afterward, or in any other mode, creditors, upon whatever consideration the debt arose, have no remedy under our system of jurisprudence, against her 'personally.' The proceeding is *in rem* against her estate. If the suit be at law under the statute, while the judgment may be for so much money, it is a necessary part of it, that it be levied of her separate estate. The condition precedent to a right of recovery, either at law or in equity, is, that there be a separate estate out of which satisfaction may be had. Our jurisprudence does not realize the possibility of a 'personal judgment against a married woman,' and has remedial machinery for creditors, only against those who have property, and only then to the extent of its value or its income, as the case may be." The scheme of the bank in this case was to encourage the agricultural interest of Louisiana, and its charter directed two millions of its capital to be employed in loans to such agricultural interests, on notes and mortgages; but the court considered that the special law chartering the bank, and under which the contract was made, was in derogation of the general law of the state of Louisiana, and ought, therefore, to be construed strictly, and not carried beyond its reason and policy. In *Hochstetler v. Hays*, 11 Col. 118, the plaintiffs brought an action for the price of goods sold a firm, of which the defendant, a married woman, was a member, in July, 1880, in Missouri. As the law then stood in that state a married woman's contracts were valid only as against her separate estate in equity. The court held that the action, being in the nature of an action at law, and seeking a personal judgment, could not be maintained.

Ordinarily, however, a married woman's contract for the purchase of

goods in one state is not in conflict with the laws governing married women in another state, or hostile to its interests, or contrary to good morals, or against public policy, and the contract may be enforced in the state where suit is brought: *Brigham v. Gilmartin*, 58 N. H. 346; *Holmes v. Reynolds*, 55 Vt. 39; *Milliken v. Pratt*, 125 Mass. 374; 28 Am. Rep. 241; and the same is true of her contract of guaranty made in another state, though she might have no power to make such a contract in the state where suit is brought: See case last cited. So, by the law of comity, a lien created by the law of one state in favor of a wife, upon the estate and future acquisitions of her husband, may be enforced in another: *Kendall v. Coons*, 1 Bush, 530.

It has been held in New York, in an action against a married woman, a manager of opera, to recover for services rendered to her in her business upon a contract made abroad that the complaint must show that the defendant has carried on in that state a separate trade or business, as she is authorized to do by the laws of that state, or that she has carried on such a business in a state having a similar law, or at least that the contract was made in contemplation of such business: *Arnold v. Bernard*, 8 Abb. Pr., N. S., 116. If a contract, made by a husband and wife in one state, is sued upon in another state in which the distinctions between actions at law and suits in equity is preserved, the wife's obligation, if of an equitable nature, can be enforced only in a court of equity, although, by the laws of the state where it was executed, it could be enforced in a court of law: *Burchard v. Dunbar*, 82 Ill. 450; 25 Am. Rep. 334.

## STATE v. PARSONS.

[124 MISSOURI, 436.]

**PEDDLER, WHO IS.**—One who goes from place to place selling and delivering medicine is a peddler.

**INTERSTATE COMMERCE.**—THE TERM, "TO PACK," means to place together and prepare for transportation, as to make up a bundle or bale.

**INTERSTATE COMMERCE.**—A "PACKAGE" is a bundle or bale made up for transportation. It may consist of a single article, but, when separate articles are placed together, and prepared for transportation in a bundle, bale, or box, they do not form as many separate packages as there are articles, though they may be wrapped separately.

**INTERSTATE COMMERCE.**—"ORIGINAL PACKAGE."—The case, or box, or bale in which separate articles are placed together for transportation constitutes the "original package" in the commercial sense. No single article therein, though separately wrapped, is an original package.

**INTERSTATE COMMERCE.**—PEDDLING MEDICINE.—The commerce clause of the federal constitution will not, as against a state statute defining a peddler and imposing a fine for dealing as such without a license, protect one who peddles single bottles of medicine manufactured in another state and which are taken from a box in which several bottles are separately wrapped and shipped into the state where the sale and delivery are made.

**PEDDLING WITHOUT A LICENSE.**—PROSECUTION.—BURDEN OF PROOF.—In a prosecution for peddling without a license the defendant, if he claims to have a license, must produce it, as it is a matter peculiarly within his own knowledge.

*L. R. Knowles and McCrary & Craig, for the appellant.*

*Attorney General R. F. Walker, for the state.*

439 BURGESS, J. At the August term, 1893, of the circuit court of Holt county, Missouri, the defendant was convicted and fined fifty dollars, under an information filed against him before a justice of the peace of said county by the prosecuting attorney thereof, charging him with dealing as a peddler without a license. He was convicted before the justice, from whose judgment he appealed to the circuit court.

The offense is charged to have been committed in said county in the month of June, 1893, at which time defendant was a resident of the state of Iowa, and was selling medicine by the bottle as the agent or employee of the S. F. Baker Company of Keokuk, Iowa, by whom the medicine was manufactured in that place and shipped to defendant in boxes as he might need it for sale. The cause is in this court on defendant's appeal.

At the close of the evidence the court instructed the jury as follows:

"The jury are instructed that, if they believe from the evidence that, if the defendant did, at the county of Holt, and the state of Missouri, on or about the seventeenth day of June, 1893, deal in the selling of medicine by going from place to place to sell the same, that he did then and there use a two-horse wagon for that purpose without then and there having a peddler's license permitting him so to do, you will find the defendant guilty as charged in the third count of the information and assess his penalty at a fine of fifty dollars.

"The defendant is presumed to be innocent of the offense charged, and, unless you believe from the evidence, 440 and that beyond a reasonable doubt, that the state has established the guilt of the defendant as charged you will acquit him, but a doubt to authorize an acquittal should be a substantial doubt of defendant's guilt and not a mere probability of his innocence."

The defendant then interposed the following demurrer to the evidence. "1. Because the evidence fails to disclose facts sufficient to convict; 2. Because the facts disclose that, under the interstate commerce clauses of the constitution, section 8, article 1, the defendant is not required to have a license, and a federal question is involved; 3. Because the

state failed to prove that defendant had no license," which the court refused; to which refusal the defendant by his counsel duly excepted. No objection is made in this court to the instructions which were given by the trial court.

The sections of the statute under which defendant was convicted are as follows:

"SEC. 7211. . . . Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning-rods, goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place to sell the same, is declared to be a peddler."

"SEC. 7212. . . . No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents, or otherwise; and no peddler shall sell wines or spirituous liquors."

Section 7217, provides that there shall be paid on all peddlers' licenses a state tax of the following rates: If he carry his goods on one or more horses or other beasts of burden, ten dollars for every period of six months, if with a cart or other land carriage, twenty dollars for every period of six months. Section 7218 provides that every person who shall be found dealing as a peddler <sup>441</sup> contrary to law, or the terms of his license, shall forfeit, if in a cart or land carriage, fifty dollars.

The defendant was a peddler within the meaning of the statute, and, as found by the jury, seems clear and beyond controversy: *State v. Smithson*, 106 Mo. 149. See, also, *State v. Emert*, 103 Mo. 241; 23 Am. St. Rep. 874.

It is insisted by counsel for defendant in their brief and printed argument: 1. That the goods sold by defendant were in the original package in which the importer shipped them into this state; 2. That the state failed to prove that the defendant did not have a license. All other questions involved in this controversy they concede were passed upon in the *Smithson* case.

It is urged by counsel for defendant, that at the time the medicine was sold by defendant it was in the original package, just as it was shipped to him by his employer, the S. F. Baker Company of the state of Iowa, by whom it was manufactured at Keokuk in that state, and that, as agent of that company, they being nonresidents of this state, the statute above quoted is in conflict with that clause in section 8, article 1, constitution of the United States, which provides

that Congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The facts in proof, however, do not sustain this contention.

The defendant testified that the medicine was shipped to him in boxes, that the bottles were separately wrapped and that he sold them separately, and that they came to him by freight on the railroad in a box. The evidence of the defendant was all there was, with respect of the manner in which the medicine was shipped, which clearly shows that the box and contents constituted the original package, and that, when opened, and the contents separated, the original package <sup>443</sup> was broken, and that, although composed of a number of bottles separately wrapped no one of them became an original package. It is true that, in the absence of any legislation by Congress to the contrary, the importer may determine the form and size of his packages he puts up for export or shipment, but he must ship them as they are put up and cannot put a dozen or more bottles in the same box, and then claim that each bottle is a separate original package. They do not become a package until made up, or prepared for transportation: *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 32.

In *Keith v. State*, 91 Ala. 2, it is said: "The term 'to pack' in its ordinary signification, especially when used in reference to carriage, means to place together and prepare for transportation, as to make up a bundle or bale, and 'package' is a bundle or bale made up for transportation. It may consist of a single article; but, when separate articles are placed together, and prepared for transportation in a bundle, bale, or box, or other receptacle, they do not form as many separate and distinct packages as there are articles, though they may be wrapped separately. The case, or box, or bale in which separate articles are placed together for transportation constitutes the original package in the commercial sense."

The separate wrapping of each bottle seems to have been a mere contrivance so that each bottle might be claimed to be an original package, while the scheme had no tendency whatever to make it such. The court did not therefore commit error in failing to instruct upon that theory of the case.

A final contention is that the state failed to prove that the defendant did not have a peddler's license. If the defendant had a license it was a matter which was particularly

within his knowledge, and the rule has <sup>443</sup> always been in this state that when such a defense is made it devolves upon the defendant to produce his license. The burden is not upon the state in this respect: *State v. Edwards*, 60 Mo. 490; *Schmidt v. State*, 14 Mo. 187; *Wheat v. State*, 6 Mo. 456.

The judgment is affirmed.

All of this division concur.

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A PEDDLER IS AN ITINERANT VENDOR OF GOODS who sells and delivers the identical goods he carries with him: *State v. Lee*, 113 N. C. 681; 37 Am. St. Rep. 649, and note.

INTERSTATE COMMERCE—"ORIGINAL PACKAGE."—An importer is liable to the state statutory penalties for selling articles imported into the state from another state, if not sold in the original package: *Ex parte Maier*, 103 Cal. 476; 42 Am. St. Rep. 129; *State v. Gorham*, 115 N. C. 721; 44 Am. St. Rep. 494. The "original package" is the package of the importer as it existed at the time of its transportation from one state into the other: See monographic note to *People v. Wemple*, 27 Am. St. Rep. 553, on the constitutionality of state regulations of interstate commerce: *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 32. One who brings goods, wares, and merchandise from one state into another, for the purpose of peddling them in the latter, may be made liable by statute to pay a peddler's license in the state where they are sold: *Rush v. Farley*, 91 Ky. 344; 34 Am. St. Rep. 233.

EVIDENCE.—THE ONUS PROBANDI is on the party who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant: *City of Fort Smith v. Dodson*, 51 Ark. 447; 14 Am. St. Rep. 62, and note.

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## YOUNG v. BYRD.

[124 MISSOURI, 590.]

RES JUDICATA.—THE FINAL SETTLEMENT OF AN ESTATE IN THE PROBATE COURT has the effect of a judgment as to all matters properly included therein or necessarily involved. Hence, if a deceased husband and wife each leaves an estate, both of which are administered upon by the same person, and the settlement of the wife's estate becomes a finality, no appeal having been taken, it is a bar to any showing, in the settlement of the other estate, that the fund adjudged to the heirs of the wife's estate did not belong to that estate, but to the other.

JUDGMENT—RES JUDICATA.—The final determination of an issue of fact by a competent court, and upon the merits, is *res judicata* as to the parties then before the court, though it is afterward sought to relitigate the same issue in another form. Nor is it essential that all the parties to both proceedings be identical.

JUDGMENTS—QUESTION OF LAW—CONSTRUCTION OF RECORD.—The legal force of a judgment and record offered in evidence is a question of law which the court should solve by an instruction when requested.

*R. B. Oliver and J. W. Limbaugh, for the appellant.*

*Wilson Cramer, for the respondents.*

553 BARCLAY, J. This appeal results from the action of the probate, and subsequently of the circuit, court of Cape Girardeau county, in sustaining exceptions to the final settlement of defendant, as administrator of the estate of Mr. Henry C. Kendall, deceased.

Mr. Kendall married Emiline Evans, November 21, 1854, and died testate in 1877, leaving her surviving.

By his will, dated January 17, 1859, duly probated in September, 1877, he devised and bequeathed to his wife, "during her natural life, to use and enjoy as she may judge best for her own convenience, profit, or emolument," all of his property of every kind and description whatever, real, personal, or mixed, "in fact, every thing that may come under or be designated by the word property." He further provided that she was not to be restricted in the free use and enjoyment of the same, or the sale of the same, or any part thereof, if she saw proper.

By the second clause he declared that if, at her death, any of the property so left by him to his wife should be undisposed of by her, and not used and appropriated by her, he devised and bequeathed the same to the children of his wife's sister, Sarah Young, living at his death, etc. He also appointed his wife executrix.

Plaintiffs are the children, and representatives of children, of the said Sarah Young. Their claim in the present case is as residuary legatees and devisees under the will above mentioned.

554 No inventory was filed or administration had in the estate of Mr. Kendall until after the death of his widow. She continued to live in the house formerly occupied by her husband up to the time she died intestate, and without issue, in 1886. March 26th letters with the will annexed were granted to defendant, Mr. Byrd, on the estate of Henry C. Kendall and also on the estate of Mrs. Kendall.

On the 27th of March, 1886, he made an inventory in each of those estates. Soon after the inventories were filed the administrator found in a cupboard at the Kendall house, sealed up in a quart can, two thousand five hundred dollars in currency, which he returned as belonging to the estate of Emiline Kendall, by an additional inventory, July 30, 1886.



Defendant, as administrator, proceeded with the administration of both estates. On the thirteenth day of August, 1888, he presented his final settlement of the estate of Emiline Kendall, which was approved by the probate court August 18, 1888, and from which no appeal was taken.

It appears from the proceedings in that case that, besides the children of Mrs. Young, sister of Mrs. Kendall, the latter left other relatives in the same degree, entitled to share in her sole estate. After the final settlement of the estate of Mrs. Kendall defendant proceeded to file his account for a final settlement of the other estate. To that account the present plaintiffs interposed exceptions, and the controversy thus raised is now before us by appeal, having gone through the probate and circuit courts in its earlier stages.

The substance of the dispute is whether or not a certain item, representing upwards of four thousand dollars, should be charged against defendant as administrator of Mr. Kendall's estate. The item represents the balance <sup>595</sup> found to be due by defendant to the estate of Mrs. Kendall upon the final settlement of that estate, and ordered by the probate court, in that proceeding, to be distributed to her heirs.

The plaintiff's claim is that all the property and money, inventoried as belonging to the estate of Mrs. Kendall, belonged, in fact, to the estate of Mr. Kendall, and not to her estate, and that it passed to plaintiffs as residuary legatees under his will, subject only to the payment of such debts as she might have incurred on the strength of her apparent ownership.

The defendant insists that the balance, shown by his final settlement of her estate, belongs by the law of descent to her next of kin generally; and that the judgment of the probate court in that proceeding requires that he shall pay it to them. The defendant makes this claim on behalf of and in the interest of the heirs of Mrs. Kendall, who are the distributees of her estate. Plaintiffs are among the distributees of that estate and are also the only residuary legatees of the other estate. Both plaintiffs and the other heirs of Mrs. Kendall were not merely constructively before the probate court in the proceeding to settle her estate, but they were actually before it.

The present plaintiffs appeared in that cause, shortly before the final settlement was submitted for action. They filed a petition, setting out, at large, facts showing their interest, and

declaring that the money and property, inventoried by the administrator as belonging to the estate of Mrs. Kendall, were in fact the property of Mr. Kendall's estate and passed to the petitioners under his will.

They prayed for an order on the administrator to pay the funds in his hands to them, including the <sup>596</sup> balance ascertained to belong to her estate, less the expenses of administration.

The other heirs of Mrs. Kendall filed an "answer" to that petition, asserting that Mrs. Kendall owned the property in her lifetime; that it had been appraised and recognized by the court as hers; and praying that the court direct the administrator to distribute said money and property equally between the heirs of Mrs. Kendall.

The "answer" was filed August 14, 1888. The administrator's final settlement in Mrs. Kendall's estate had been filed August 13, 1888, and on the 18th of August, 1888, the probate court approved the final settlement, and ordered the administrator to distribute the balance in his hands "among the legal heirs of said deceased according to their respective rights of distribution," and directed that the administrator be discharged upon filing the receipts of the distributees. The final settlement of that estate showed a "balance due the heirs of Emiline Kendall, deceased, \$4,023.17," and the "amount due each heir, \$1,005.17." She left four brothers and sisters (or their descendants). The plaintiffs represent the descendants of one of her sisters (Mrs. Young).

At the trial in the circuit court the above facts were shown, as well as many others, which need not be mentioned in the view now taken of the case. The cause was tried by the court; and the latter refused to declare the law to be that the final settlement and order of distribution in the matter of the estate of Mrs. Kendall were a bar to plaintiffs' maintaining the present proceeding.

The effect and force of the final settlement of Mrs. Kendall's estate were those of a judgment as between the parties directly affected, and then before <sup>597</sup> the probate court. The administrator of that estate was adjudged liable to account in that proceeding to plaintiffs and the other heirs of Mrs. Kendall for the very fund which plaintiffs now seek to show did not of right belong to the assets of that estate.

In *State v. Gray* (1891), 106 Mo. 533, it was held by this division, unanimously, that "final settlements of adminis-

trators in the probate court have the force and effect of judgments, and are conclusive as to all matters, the proper subject of account, included in such settlements and necessarily involved in the final settlement thereof."

This being so, the administrator of Mrs. Kendall's estate certainly was presumptively bound to pay to the distributees their respective shares of that estate as ascertained by the final settlement.

If the position now taken by plaintiffs in this case is correct, the balance found in the other case as payable to the heirs general of Mrs. Kendall was too large, by more than four thousand dollars. Plaintiffs were parties to that proceeding, and sought therein to have the fund now in question turned over to them as residuary legatees of Mr. Kendall. But the probate court, though it made no specific finding upon that issue, did in effect act upon it by its final order of distribution which adjudged the fund to be a part of that estate, contrary to their claim in that particular.

The controversy in the present case is whether the disputed fund was properly dealt with as part of Mrs. Kendall's estate. The real parties concerned in the decision of that issue in the case at bar were before the probate court in the settlement of the other estate. It is immaterial that the forms in which the same issue may arise are different. If it is once finally decided by a competent court on the merits between <sup>598</sup> the parties whose rights are afterward sought to be relitigated the decision binds them: *Wager v. Providence Ins. Co.* (1893), 150 U. S. 99. Nor is it essential that all the parties to both proceedings are identical. It is very clear that the fund in controversy could not belong to the distributees of Mrs. Kendall, and also to the estate of Mr. Kendall in the circumstances shown by this record.

The trial court, as requested, should have declared the legal force of the judgment and record in the wife's estate as offered in evidence. That was a question of law, properly devolving on the court to solve by an instruction when duly requested, as it was in this case.

We think the learned trial judge erred in declining to give the first final settlement the legal efficiency to which it was entitled. Hence the judgment should be reversed and the cause remanded.

BLACK, C. J., and BRACE and MACFARLANE, JJ., concur.

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**FINAL SETTLEMENT IN PROBATE COURT—CONCLUSIVENESS OF.**—A decree of the probate court, unless appealed from, is final and conclusive upon the parties as to all matters within its jurisdiction which are necessarily involved in the issue; but this general rule applies only to final decrees: *Mis's Appeal*, 35 Conn. 121; 95 Am. Dec. 222; showing, however, that a distinction is to be observed between orders and decrees, made during the settlement of an estate, which are merely preparatory to a final settlement and distribution, and a final decree adjusting and closing an administration account; and that the latter only possesses the elements of a final judgment. In some of the states no distinction is recognized between original and final accounts of executors or administrators, and, if no appeal is taken within the statutory period, a partial account is conclusive: See monographic note to *Picot v. Biddle*, 86 Am. Dec. 145, discussing the effect as *res judicata* of annual settlements of executors or administrators. A decree settling the final account of an executor or administrator is conclusive in the absence of fraud: *Stubblefield v. McRaven*, 5 Smedes & M. 130; 43 Am. Dec. 502; at least as to items set out therein and directly acted on: *App v. Dreisbach*, 2 Rawle, 237; 21 Am. Dec. 447. A court of equity, however, has power, where fraud is alleged, to inquire into such final account, and to do equity in the case: *Lucich v. Medin*, 3 Nev. 93; 93 Am. Dec. 376.

**JUDGMENT—CONCLUSIVENESS OF—PARTIES NOT IDENTICAL.**—The decision of a court of competent jurisdiction directly upon a question, the determination of which is necessarily involved in the judgment, is conclusive upon the parties and their privies upon the same matter in the same or another court of competent jurisdiction: See monographic note to *Fahey v. Esterly Machine Co.*, 44 Am. St. Rep. 570, on the proof of *res judicata*: *Burrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 233, and note; note to *Sullivan v. Shell*, 31 Am. St. Rep. 898. A judgment is conclusive if on a direct point, though the object of the two suits is different; *Gallaher v. City of Moundville*, 34 W. Va. 730; 26 Am. St. Rep. 942. A judgment is conclusive of the issues involved in a controversy as between the parties and those standing in privity with them, although in the action in which it is pleaded some only of the parties are litigants: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421.

## REED v. HOWELL COUNTY.

[126 MISSOURI, 58.]

A COUNTY IS NOT LIABLE for damages caused by its wrongful attachment of property.

*James Orchard and M. B. Clarke*, for the appellant.

*H. D. Green and Olden & Orr*, for the respondent.

50 SHERWOOD, J. Howell county sued Robert Reed, and "wrongfully attached" his property, to wit: 176 head of cattle, valued at \$3,500, and garnished a debtor of his who owed him \$375 and interest. Owing to the attachment the cattle

greatly depreciated in value during the pendency of the suit, and 36 head of them were wholly lost to plaintiff, to his injury in the sum of \$1,600. The debtor of plaintiff, solvent when garnished, became insolvent and died in that condition, whereby plaintiff pocketed a loss of \$610. He also expended \$512.50 as attorney's fees, and \$150 in expenses in attending court, whereby he was damaged in the sum of \$2,722.50, for which he asked judgment.

These allegations of the petition were admitted on <sup>an</sup> general demurrer to be true, and the trial court held the petition sufficient in law, and, the defendant county declining to plead further, final judgment was entered for plaintiff.

Beginning with *Reardon v. St. Louis County*, 36 Mo. 555, it was ruled that that county was not responsible for damages arising from a defective bridge over Gingras river, whereby the husband of the plaintiff lost his life. That case has since been followed in this court in *Swineford v. Franklin County*, 73 Mo. 279, where it was held that the county was not liable for filling up a mill-race which crossed the county road, thereby virtually destroying the mill of the plaintiff. Two of the judges, however, dissented in that case.

In *Clark v. Adair County*, 79 Mo. 536, the bridge over which the plaintiff was crossing fell, inflicting injuries on him, his team and wagon. The *Reardon* case was followed, holding that counties are only *quasi* corporations created by the legislature for certain specific purposes, and that as such they are not responsible for neglect of duties enjoined on them or their officers, unless a right of action is given by statute for such neglect.

In *Hannon v. St. Louis County*, 62 Mo. 313, this principle is recognized, and the distinction pointed out between that case and *Reardon's* case. To the same effect see *Jefferson County v. St. Louis County*, 113 Mo. 619.

There is nothing in the circumstances of this case which serves to distinguish it from any of those cases where the county was held not liable; for it will be presumed, in the absence of any allegation in the petition to the contrary, that the officers of the county, in the institution of the suit which is the subject of the present action, were engaged in the performance of those public duties which were enjoined on them by the direct authority of the state, and not undertaken by <sup>or</sup> those officers for the private benefit or emolument of the county.

Holding these views the judgment must be reversed and the cause remanded.

All concur.

**COUNTIES—TORTS.**—A county is not liable for the acts of its servants which cause injury to others, unless made so by statute: See monographic note to *Gilman v. County of Contra Costa*, 63 Am. Dec. 294, 295, on liability of counties, mode of its enforcement, and power of the legislature to modify.

## CLOW v. CHAPMAN.

[125 MISSOURI, 101.]

**HUSBAND AND WIFE—ALIENATION OF HUSBAND'S AFFECTIONS.**—Under statutes giving the wife a separate legal existence, and placing her, with respect to her property and personal rights, upon an equality with her husband, she may maintain an action against a third person for alienating her husband's affections and depriving her of his society.

**MARRIED WOMEN—STATUTES, CONSTRUCTION OF.**—If a statute concerning married women is, in the main, remedial it should be construed and administered so as to give effect to its general object and purpose.

*Amick & Brown, J. W. Boyd and J. W. Brockett*, for the appellant.

*Dowe, Johnson & Rusk*, for the respondent.

103 BLACK, P. J. According to the petition the plaintiff and David Clow were married in 1866, and lived together as husband and wife until 1884, when they were divorced, for the fault and misconduct of David. Before they were divorced the defendant alienated the affections of the plaintiff's husband, and induced him to abandon plaintiff and take up his abode with her, the defendant. The petition contains other averments which need not be recited. At the trial the defendant objected to the introduction of any evidence for the assigned reason that the petition stated no cause of action, which objection the court sustained, and hence this appeal.

The common law gives a husband an action for damages against a third person for enticing away his wife and depriving him of her society: Schouler on Husband and Wife, sec. 64. Proof of pecuniary loss is not necessary to sustain such an action, because the action is based upon loss of the companionship and society of the wife: *Rinehart v. Bills*, 82 Mo. 534; 52 Am. Rep. 385; *Bigaouette v. Paulet*, 134 Mass. 125; 45 Am. Rep. 307.

The question we are now called upon to determine is, whether a wife has a corresponding action against third persons for the alienation of the affections of her husband, and depriving her of his society. It seems to be very generally held in this union that the common law gives her no such action, though this question is left in much doubt, in England, by the conflicting opinions in *Lynch v. Knight*, 9 H. L. Cas. 577.

It is held in *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, that a <sup>104</sup> married woman has no such action, either at common law or under the statute of that state. The statute there considered gave the wife an action for any "injury to her person or character." On the other hand, a number of well-considered cases in the courts of different states affirm the right of a married woman to maintain an action against third persons for enticing her husband away, and depriving her of his aid, comfort, and society: *Bennett v. Bennett*, 116 N. Y. 584; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Seaver v. Adams*, 19 Atl. Rep. 776 (N. H. March 14, 1890); *Postlewaite v. Postlewaite*, 1 Ind. App. 473; *Bassett v. Bassett*, 20 Ill. App. 544; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13.

There is considerable diversity in these cases as to the grounds upon which the judgments are made to stand. In *Bennett v. Bennett*, 116 N. Y. 584, it is held a wife had a right to such an action by the common law, but the right could only be enforced by joining her husband in the suit; that the code of that state gives her the right to sue in her own name, so that she may now prosecute such a suit for her own benefit. *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, is made to stand on the ground that, while the right of the wife to maintain such an action at common law may be doubtful, all doubts are resolved in her favor by the statute laws of that state, which provide that all rights in action which "have grown out of a violation of any of her personal rights" shall remain her separate property and under her sole control. It is also held in that case that the benefit which a wife has in the society of her husband is equal to that which he has in her society.

In *Seaver v. Adams* (N. H. March 14, 1890) the court recites the substance of the various legislative enactments of that state on the subject of married women, placing a married woman upon an equality with her husband in respect

<sup>105</sup> of propeerty, torts, and contracts, and conferring upon her the right to sue and be sued. It is then said: "And as the only reason why the wife formerly could not maintain an action for the alienation of her husband's affections was the barbarous common-law fiction that her legal existence became suspended during the marriage, and merged into his, which long since ceased to obtain in this jurisdiction, there remains now not the semblance of a reason, in principle, why such an action may not be maintained here."

Such are the grounds upon which some of the cases sustain the wife's action for damages in the class of cases now in question.

We find it stated by one author that the wife cannot maintain such an action at common law or under a statute, save where the statute clearly enables her to prosecute such a suit: Schouler on Husband and Wife, sec. 65. On the other hand it is said: "To entice away, or to corrupt the mind and affections of one's consort is a civil wrong for which the offender is liable to the injured husband or wife": Bigelow on Torts, 153. Cooley says in the text: "It is also generally supposed that the wife can have no action against one who should seduce the husband's affections from her, or in any manner deprive her of his care and society"; but in a note he says: "We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her": Cooley on Torts, 2d ed., 267.

We may now bring in contrast the status of a married woman in respect to her personal rights under the common law and our statutes, and first as to the common law. "By marriage the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the <sup>106</sup> marriage, or, at least, is incorporated and consolidated into that of the husband": 1 Blackstone's Commentaries, 442. And as to the many disabilities of the wife following from this principle of unity, the great commentator says they are "for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England": 1 Blackstone's Commentaries, 445.

According to the statute law of this state a husband cannot convey any interest to his wife in her real estate, or the rents and profits thereof, save by deed executed by her as well as by himself. He is not liable for the debts of his wife incurred



by her before marriage. All real estate and personal property, including rights in action, belonging to her at her marriage, or thereafter acquired, or due as the wages of her separate labor, "or have grown out of any violation of her personal rights, shall be and remain her separate property and under her sole control"; and she may "in her own name, and without joining her husband as a party plaintiff, institute and maintain any action for the recovery of any such personal property, including rights in action as aforesaid, with the same force and effect as if such married woman was a *feme sole*." We omit reference to statutes enacted after the present cause of action accrued.

Now, the common law prevails in this state, except in so far as it has been modified by statute. Let it also be conceded that by the common law the wife could not maintain a suit against third persons for depriving her of her husband's comfort and society, because her legal existence became merged in that of the husband by the marriage. The case then turns upon the effect to be given to these statutes. They are disabling to a large extent, so far as they apply in terms to the husband; and they are enabling, in so far as they apply to the wife. They give her an entirely different standing <sup>107</sup> from that occupied by her at common law. Her position is now more like that of a wife under the civil law. Instead of her legal existence being suspended, as incorporated and consolidated into that of her husband, she is made to stand out in bold relief with a separate and distinct legal existence as to her property and also as to her personal rights; and she may enforce all such rights by proceedings in her own name independently of her husband. She is placed upon an equality with her husband in many and indeed most respects. By force of the marriage contract husband and wife are each entitled to the society and comfort of the other, the one to as great an extent as the other. As a wife is now placed on an equality with her husband in respect of her property and personal rights, and as a husband may have his action as against a third person for enticing away his wife, the wife has her action against third persons for enticing away her husband. This conclusion has, in our opinion, the support of the great weight of authority and the better reason.

But it is insisted, on behalf of the defendant, that the statutes of this state, before set out, do not confer upon the wife

any new rights, that the personal rights mentioned in these statutes are the personal rights which she had at common law, that disabilities are removed but no new rights are created, and, as she had no right of action at common law to remedy a wrong like the one in question, she has none under the statute law. There is, at first blush, some force in the argument; but, upon consideration, we consider it no more than adhering to a barren technicality. The statutes, when considered in their full scope and purpose, give the wife a separate legal existence, whereas, before, her legal existence was considered merged into that of her husband, and for this reason, and no other, she could not maintain the action. New rights and new obligations <sup>108</sup> necessarily arise from the changed condition as incidents thereto. When she is given the sole control of her personal property and the right to recover the same by her own suit it must follow as an incident that she has the right to make contracts in respect of such property; though the statute may not in terms give her the right to make contracts in relation thereto. Full dominion over her property carries with it the power to dispose of such property as a necessary incident. So, new personal rights and obligations flow to her because of the fact that she is given a separate and distinct legal existence.

Besides all this the words of the statute, "personal rights," are very comprehensive. They are the same words found in the Ohio statute. In the case before cited from Wisconsin the court approves the Ohio case, because the statute of Ohio uses these comprehensive words. The statutes of this state concerning married women are for the most part remedial, and should be construed and administered so as to give effect to their general object and purpose. We see nothing in the argument pressed upon our consideration to modify the result before expressed.

The judgment is reversed and the cause remanded.

All concur.

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**REMEDIAL STATUTE—HOW CONSTRUED.**—In construing a remedial statute its language, so far as is consistent with a fair construction of the law, should be so interpreted as to promote and advance the remedy: *McNulta v. Lockridge*, 137 Ill. 270; 31 Am. St. Rep. 362, and note.

**WIFE'S ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS.**—It has been shown in this series of reports that a husband has a right of action for the alienation of his wife's affections: See monographic note to *Fratini v. Castini*, 44 Am. St. Rep. 845-852, discussing the subject; though merely giving her

shelter, protection, and support would create no cause of action against the party so acting: *Rabe v. Hanna*, 5 Ohio, 530; *Burnett v. Burkhead*, 21 Ark. 77; 76 Am. Dec. 358; *Turner v. Estes*, 3 Mass. 317. The object of this note is to show whether a wife has a corresponding cause of action for the alienation of her husband's affections. It is said by Orton, J., in *Duffies v. Duffies*, 76 Wis. 374, 20 Am. St. Rep. 79, that "the justice and advantages of such an action are at least doubtful," and that "there would seem to be very good reason why this right of action should be denied." "This right of action in the wife," he says, "would be the most fruitful source of litigation of any that can be thought of. The loss of his society need not be permanent for a cause of action. For a longer or shorter time, if caused by improper inducements or enticements, the right would accrue." His honor also advances the unsound propositions that "the loss of her husband's society is not an injury to her person, property, means of support, or character, and such an action cannot be forced within the terms or spirit of the statute, by the most strained and liberal construction. Such a right of action does not exist by law, nor can it be inferred from the ameliorated and changed conditions of the wife, and her equality with her husband, produced by modern legislation in her behalf. Whatever equality of rights with her husband she may have it is not proper to say that 'her right to the society of her husband is the same, in kind, degree, and value, as his right to her society.'" In Wisconsin, therefore, a wife cannot maintain an action against a woman who has alienated from her the affections and deprived her of the society of her husband: *Duffies v. Duffies*, 76 Wis. 374; 20 Am. St. Rep. 79, and note. So, in Maine: *Doe v. Roe*, 82 Me. 503; 17 Am. St. Rep. 499. And it was so held, at first, in Indiana, but by a divided court: *Logan v. Logan*, 77 Ind. 558. Mr. Justice Blackstone was evidently not forgotten when these decisions were made, for he gave as a reason for denying the wife's right of action in cases of this kind the following: "The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury": 3 Blackstone's Commentaries, 142. Notwithstanding this, the authorities are divided upon the question as to whether such an action would lie at common law: *Lynch v. Knight*, 9 H. L. Cas. 577; *Bennett v. Bennett*, 116 N. Y. 584; notes to *Shaddock v. Clifton*, 94 Am. Dec. 593; *Westlake v. Westlake*, 32 Am. Rep. 406; *Duffies v. Duffies*, 76 Wis. 374; 20 Am. St. Rep. 79; some of the cases holding that "as the wife had no right of property in any damages recovered on her account, for any cause, neither could she have any right of action to recover them": *Warren v. Warren*, 89 Mich. 123, 124.

But, whatever may have been the status of married women a hundred and fifty years ago, the disabilities of coverture have, since then, been gradually removed by legislation, and have practically disappeared from our jurisprudence. A husband and his wife are equal under the law, at least with respect to the conjugal affection and society which each owes to the other. The husband owes to the wife all that the wife owes to him. She has the same right to the *consortium* of her husband that he has to hers. Her right is the same in kind, degree, and value, and an injury thereto is a violation of her personal rights and an injury to her person. She is as much entitled, under the law and by moral right, to the society, protection, and support of her husband as he is to her society and services in his household: *Williams v. Williams*, 20 Col. 51; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; *Warren v. Warren*, 89 Mich. 123; *Lynch v. Knight*, 9 H. L. Cas. 577; *Holmes*

v. *Holmes*, 133 Ind. 386; *Bennett v. Bennett*, 116 N. Y. 584; overruling *Van Arnam v. Ayers*, 67 Barb. 544; *Baker v. Baker*, 16 Abb. N. C. 293; *Jaynes v. Jaynes*, 39 Hun, 40; *Bassett v. Bassett*, 20 Ill. App. 543.

It has, therefore, been held by state courts, other than those of Maine and Wisconsin, that a wife may, without joining her husband, maintain an action to recover damages for the alienation of his affections, and the consequent loss of his society, assistance, and support; if, under the statutes of the state under which she prosecutes her action, she is given power to sue for personal wrongs without joining her husband: *Haynes v. Nowlin*, 129 Ind. 581; 28 Am. St. Rep. 213; overruling *Logan v. Logan*, 77 Ind. 558; *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; *Williams v. Williams*, 20 Col. 51; *Wolf v. Wolf*, 130 Ind. 599; *Postlewaite v. Postlewaite*, 1 Ind. App. 473; *Bennett v. Bennett*, 116 N. Y. 584; overruling *Van Arnam v. Ayers*, 67 Barb. 544; *Reed v. Reed*, 6 Ind. App. 317; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 293, disregarding *Van Arnam v. Ayers*, 67 Barb. 544; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 226; *Jaynes v. Jaynes*, 39 Hun, 40; *Manwarren v. Mason*, 79 Hun, 592; *Bassett v. Bassett*, 20 Ill. App. 543; *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397; *Mehrhoff v. Mehrhoff*, 26 Fed. Rep. 13; *Waldron v. Waldron*, 45 Fed. Rep. 315. "The actual injury to the wife," says *Vann, J.*, in *Bennett v. Bennett*, 116 N. Y. 584, 590, "from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship, and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation not only of a mutual right, but also of a legal right arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy not provided by statute, but springing from the flexibility of the common law and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society unless she also has a right of action for the loss of his society? Does not the principle that 'the law will never suffer an injury and a damage without a remedy' apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?" Compare note to *Shaddock v. Clifton*, 94 Am. Dec. 593, showing that under the term *consortium* are included the person's affections, society, and aid. If a statute authorizes a married woman to sue alone it cuts off the right of the husband to be joined with her, and permits her to sue and recover for herself: *Bennett v. Bennett*, 116 N. Y. 584. Even a divorced woman may maintain an action for the alienation of the affections of her former husband: *Postlewaite v. Postlewaite*, 1 Ind. App. 473.

*Pleadings.*—If an action is brought by a wife against the mother of her

husband for the alienation of his affections the complaint is bad unless it states that the acts were maliciously done. The legal presumption in such cases is that the parent will act for the best interest of the child, although married and of full age: *Reed v. Reed*, 6 Ind. App. 317. In an action for enticing away a husband it is sufficient to allege in the complaint the ultimate facts, without a statement of the arts made use of to accomplish the illegal purpose: *Williams v. Williams*, 20 Col. 51. But if such allegations are made they should be specific. Thus, a complaint that defendants began systematically to poison and prejudice the mind of the husband against the wife by telling him false stories about her, and charging her with unwillingness and inability to do housework, and by treating her with gross disrespect in his presence, and finally, by falsely and maliciously charging her in his presence with having committed adultery, is not sufficient, except as to the latter allegation, and even that should be made more specific by stating the time and place where the words were spoken, and what words were used: *Mehroff v. Mehroff*, 26 Fed. Rep. 13. And the answer should be definite and certain as to a complete or partial defense. If portions of the answer do not set up a complete defense, and the pleader omits to state that the defense is pleaded as a partial defense, an order will be granted requiring him to make his allegations more definite and certain, so as to show whether he intended to make a complete or partial defense. Therefore, in an action for alienating the affections of a husband, allegations of his previous divorce, or of previous separation, should be stated as a partial defense: *Simmons v. Simmons*, 21 Abb. N. C. 469.

*Evidence—Declarations.*—In an action for the alienation of a husband's affections it must affirmatively appear that the defendant was the seducer and enticer, and plaintiff fails to make out a case if it appears that the husband enticed the defendant into illicit relations with him: *Churchill v. Lewis*, 17 Abb. N. C. 226. Intentional alienation must be shown: *Warner v. Miller*, 17 Abb. N. C. 221; *Westlake v. Westlake*, 34 Ohio St. 621; 32 Am. Rep. 397. It is not enough that defendant kept a lawdy-house, and that the husband merely went there and associated with her. Nor is it enough to show that defendant harbored the husband, though it might be otherwise in a corresponding action by the husband, as the sufficiency of a fact of harboring in such an action depends on his right to fix the abode: *Warner v. Miller*, 17 Abb. N. C. 221. It must appear by a preponderance of evidence that the alienation and abandonment, if any, were caused by the defendant knowingly and by direct and active interference: *Waldron v. Waldron*, 45 Fed. Rep. 315. The acts of the defendant that caused the alleged injury must have been malicious: *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; but malice, in such cases, may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse, as the very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another: *Williams v. Williams*, 20 Col. 51.

We apprehend that any thing which throws light upon the causes and motives which induced the husband's estrangement should be admitted as part of the *res gesta* in an action for the alienation of his affections. Thus, in an action brought by the wife against her father-in-law, evidence that defendant's son was married to the plaintiff while intoxicated, and that he had never had any affection for her, either before or after the marriage, is admissible not only in mitigation of damages, but to prove defendant's theory that the husband voluntarily left the plaintiff: *Bassett v. Bassett*, 20 Ill. App. 543. And the plaintiff, while testifying in her own behalf as to

the fact of parting, may state a conversation that occurred between herself and her husband, at the time, to show their separation and the ground assigned by the husband for it. Proof of the fact of separation being admissible, the husband's declarations, at the time, explanatory of that act, are also admissible as a part of the *res gestæ*, for it is a familiar principle that "where it is necessary or proper in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character": *Baker v. Baker*, 16 Abb. N. C. 293, 302, citing 1 Phillips on Evidence, 231. But declarations of the husband not made at the time of the act which they are supposed to characterize, not made in the presence of defendant, and merely explanatory of the conduct of the defendant, or of himself and wife, are inadmissible in such an action: *Manwarren v. Mason*, 79 Hun, 592; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, *Huling v. Huling*, 32 Ill. App. 519, and if admitted over defendant's objection a new trial will be granted, for it cannot be said that such declarations may not have had a potential influence upon the jury in inducing it to render its verdict in favor of the plaintiff: *Manwarren v. Mason*, 79 Hun, 592. In determining whether the declarations of a person not a party to an action are, or are not, competent evidence in a particular case, the nature of the issue and the special circumstances under which the declarations were made must be considered. Whenever it is proper to prove the doing of an act by a certain person the declarations of such person, accompanying the act and having reference thereto, are clearly admissible in evidence as explanatory of the act itself. Consequently it is proper, in an action by a wife for the alienation of her husband's affections and causing him to separate from and desert her, to admit in evidence the declarations of the husband, having reference to his separation or contemplated separation from his wife, for the purpose of showing what caused such separation, though his mere declarations are not admissible to show what the conduct of the defendant really was: *Williams v. Williams*, 20 Col. 51.

A woman cannot be chargeable with alienating the affections of another woman's husband simply because he has become enamored of her, although after he becomes divorced from his wife the other woman consents to marry him. Hence, in such an action, the complaint and evidence, in a suit for divorce previously obtained by the plaintiff against her husband are inadmissible: *Waldron v. Waldron*, 45 Fed. Rep. 315. A charge by the wife that her husband's affections have been alienated "is one easily made," says Bunn, J., in *Waldron v. Waldron*, 45 Fed. Rep. 315, 317, "and, as it affects the person, the property, and the character of the person charged with the wrong, it should be proved by testimony convincing and satisfactory to the minds and consciences of the jury. The burden of proof is always upon the person making such a charge, and the charge should not be assumed to be true without evidence or without a preponderance of evidence to support it. The evidence adduced may be circumstantial in character, and usually is, in such cases; but it should be sufficient and satisfactory to induce the jury to believe the charges to be true." "We know, as a matter of common knowledge and observation, that, as a general rule, men woo and women are wooed and won; that men seduce and allure and lead women from the path of virtue, and that women are allured, seduced, and led astray, but we also know, from common observation, that this general rule does not always hold, and that sometimes women woo men; that sometimes women allure, seduce,

and debauch men; that women, upon occasion, induce, allure, and persuade men to abandon and desert their wives, and form new relations, lawful or unlawful": *Waldron v. Waldron*, 45 Fed. Rep. 315, 320, per Bunn, J. It is, therefore, for the jury to say, from all the evidence in such a case, what were the facts, and whether the issue stands proved or unproved.

*Damages.*—In an action by a wife for the alienation of her husband's affections the measure of damages is based on the actual injury to the plaintiff by the loss of her husband's affection and support, and on the pecuniary circumstances of the defendant: *Waldron v. Waldron*, 45 Fed. Rep. 315. If the injury was inflicted wantonly and maliciously exemplary damages may be awarded, in addition to compensation for the loss of support and maintenance: *Williams v. Williams*, 20 Col. 51; *Warner v. Miller*, 17 Abb. N. C. 221; *Waldron v. Waldron*, 45 Fed. Rep. 315. Damages for the injury to the wife's right must be given to her solely: *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258; *Bennett v. Bennett*, 116 N. Y. 584; and her right to recover is not affected by the fact that she and her husband are still together: *Foot v. Card*, 58 Conn. 1; 18 Am. St. Rep. 258. But if the plaintiff cohabits with her husband, after believing him to have been guilty of illicit relations with the defendant, that fact, as well as delay in bringing the action, may be considered by the jury in mitigation of damages: *Churchill v. Lewis*, 17 Abb. N. C. 226. The jury, in estimating the damages in such a case, may consider the true relations between the plaintiff and her husband, whether happy or otherwise, before his acquaintance with the defendant; the state of his feeling, intent, and the extent of his affections towards his wife; and the effect produced upon the plaintiff by the existence of the relations between the defendant and her husband as they appeared, at the time, to the wife: *Churchill v. Lewis*, 17 Abb. N. C. 226. While exemplary damages may be awarded for injuries affecting the mind and sensibilities of an individual, no absolute rule can be laid down as to the measure of damages in an action for enticing away a husband. Reasonableness being the only limit to the exemplary damages allowable in such a case, the common-law practice may be followed in declaring for and awarding such damages. If the right of recovery is clear, the court will not disturb a verdict on the ground that it is too much or too little, unless it is grossly disproportionate to the rights of the parties, as shown by the evidence: *Williams v. Williams*, 20 Col. 51. In this case a judgment upon a verdict for twelve thousand five hundred dollars was affirmed and a rehearing denied.

*Parent's Advice.—Instructions.*—The relation of parent and child may excuse much partiality by one for the other, and a parent may, in good faith and from worthy motives, in a moderate, temperate, and careful manner, advise his son as to his domestic affairs without incurring liability for alienation of affections, though his advice influences a separation between his son and the latter's wife; but such relation will not excuse gross injustice deliberately perpetrated against the rights of the wife: *Huling v. Huling*, 32 Ill. App. 519; *Williams v. Williams*, 20 Col. 51. An instruction in such a case for the plaintiff, and ignoring the relation of father and son, and the question of good faith, is bad: *Huling v. Huling*, 32 Ill. App. 519. Again, an unjustifiable act is not necessarily malicious, and, in an action for enticing away a husband, it is not technically accurate, as an abstract proposition, to give an instruction to the effect that if the conduct of the defendant was unjustifiable, and actually caused the injury complained of, then malice in law is implied from such conduct; as such a rule ignores the distinction between the intentional commission of a wrongful act and the doing of a

wrongful act through mere error of judgment, as well as the distinction between a grievous wrong and a mere nominal trespass: *Williams v. Williams*, 20 Cal. 51.

*Arrest—Statute of Limitations.*—An order of arrest, in an action by a wife for the alienation of her husband's affections, is a remedy allowed by the code of New York: *Breiman v. Paasch*, 7 Abb. N. C. 249. Such an action is not governed by that section of the statute of limitations concerning direct physical injuries to the person, but is controlled by that section which limits the time in which an action may be brought for an injury to personal and relative rights: *Bassett v. Bassett*, 20 Ill. App. 543.

## POTTER v. ADAMS.

[125 MISSOURI, 113.]

**DEED.—THE DESTRUCTION AND CANCELLATION OF A DEED**, after it has been delivered, does not revert the title in the grantor.

**DEED, LOST OR DESTROYED.—SECONDARY EVIDENCE** is admissible to prove the existence, loss, and contents of an unrecorded deed, which has been lost or destroyed by accident or mistake; but not where it has been voluntarily destroyed by the grantee for the purpose and with the intention of revesting the title in the grantor.

**DEED, LOST OR DESTROYED—ESTOPPEL FROM SETTING UP TITLE—CONTRIVING TO DEFRAUD CREDITORS.**—A grantee, who has destroyed or consented to the destruction of his unrecorded deed with the intention of thereby revesting the title in the grantor, will be estopped from setting up title under such deed; and those claiming under him will also be estopped, unless the destruction of the deed was a contrivance to defraud the creditors of the grantee.

**FRAUDULENT CONVEYANCES—ISSUE OF FRAUD MAY BE TRIED IN EJECTMENT.**—If a grantee destroys his unrecorded deed for the purpose of revesting title in his grantor, and has the latter execute a deed in trust for his wife, with the intention of hindering, delaying, and defrauding his creditors, the whole transaction is void at law as well as in equity, and the issue may be tried in an action of ejectment, as well as in a suit in equity, to set aside the second deed on the ground of fraud.

**FRAUDULENT CONVEYANCES—FRAUD MAY BE PROVED IN EJECTMENT.**—A purchaser at a sheriff's sale made by virtue of a creditor's judgment may, in an action of ejectment, defeat a deed made to defraud creditors, by proof of its fraudulent character.

**POSSESSION, WHEN IN HIM WHO HAS BETTER TITLE.**—If two or more persons are in possession of land, each under a separate conveyance or color of title, the possession will be treated as being in him who has the better title.

**ADVERSE POSSESSION OF WIFE—LIMITATION OF ACTION.**—If a husband destroys his unrecorded deed for the purpose of revesting title in his grantor, and has the latter convey the land to a trustee for the use of the grantee's wife, for the purpose of defrauding the grantee's creditors, which deed is recorded, and the husband and wife remain in possession for more than ten years, the wife, having the title, will be deemed to have had possession adverse to her husband and all others since the recording of the deed to her, and the ten-year statute of limitations will commence to run from that time.



*Wm. S. Shirk*, for the appellants.

*D. E. Wray*, for the respondents.

<sup>123</sup> BLACK, P. J. The plaintiffs are the widow and heirs of Samuel W. Potter. They brought this action to recover one hundred and twenty acres of land in Morgan county. All parties claim under John Hupp.

The plaintiff's evidence tends to show that John Hupp sold the land in February, 1866, to Thomas Baine; that Baine and his wife moved upon the land at that date, and continued to reside thereon until 1879 or 1880, a period of about fourteen years; that Hupp executed and delivered a deed, dated in February, 1866, conveying the land to Thomas Baine, which deed was never recorded; and, to defraud his creditors, Baine destroyed this unrecorded deed and caused Hupp to execute another one of date May 11, 1867, conveying the land to a trustee for the use of his wife.

The plaintiff also read in evidence two sheriff's deeds dated in October, 1884, conveying all the title and interest of Thomas Baine to Samuel W. Potter. These deeds are based upon judgments rendered against Thomas Baine in 1883 and 1884. One of the judgments seems to have been based upon a debt contracted by Thomas Baine prior to the date of the deed from Hupp to J. H. Potter in trust of Evaline Baine.

The defendants read in evidence the deed from <sup>124</sup> Hupp to J. H. Potter, before mentioned, conveying the land to Potter in trust for the sole use and benefit of Evaline Baine. As has been said, this deed bears date of May 11, 1867, and was duly recorded on the eighteenth day of the same month and year. The defendants then read in evidence a deed from Evaline Baine and her husband to the defendant, Howard Adams and to one Philip Adams, dated August 8, 1888, and recorded in 1889.

After Baine and wife left the land in 1879 or 1880 they leased it to various persons down to the date of the last-mentioned deed. For the year commencing March 1, 1883, the lease appears to have been made by Thomas Baine in his own name and for that year the rents were paid to him. For the other years the land was rented by Mrs. Baine and she received the rents. She and her husband resided together at all times. This suit was commenced in 1891, twenty-four years after the date of the alleged fraudulent deed.

1. The first inquiry presented by this record is as to the

effect of the destruction of the first deed from Hupp to Thomas Baine and the execution and delivery of the second by Hupp to J. H. Potter, conveying the land to the latter in trust for Evaline Baine.

The destruction and cancellation of a deed after it has been delivered does not revest the title in the grantor. Title to land cannot be transmitted in that way. Where a deed has been lost or destroyed by accident or mistake secondary evidence may be introduced of its existence, loss, and the contents thereof. But a different rule prevails where the grantee has voluntarily destroyed an unrecorded deed for the purpose and with the intention of revesting the title in the grantor. In such a case he will not be allowed to prove the contents of the destroyed deed by parol evidence.

It was said in *Farrar v. Farrar*, 4 N. H. 191, 17 Am. Dec. 410: <sup>125</sup> "The true ground on which these decisions are to be supported is that the grantee having voluntarily and without any misapprehension or mistake consented to the destruction of the deed with a view to revest the title, neither he nor any other person claiming by a title subsequently derived from him is to be permitted to show the contents of the deed so destroyed by parol evidence." See, also, on the same subject, *Speer v. Speer*, 7 Ind. 178; 63 Am. Dec. 418; *Mussey v. Holt*, 24 N. H. 252; 55 Am. Dec. 234. It may, therefore, be said with safety that a grantee who has destroyed or consented to the destruction of his unrecorded deed with the intention of thereby revesting the title in the grantor will not be allowed to produce parol evidence of the contents of the destroyed deed. He will be estopped from setting up title under such deed. In this way, namely, by estoppel, the destruction of the deed will have the intended effect.

Now, the evidence produced by plaintiffs themselves shows that Thomas Baine destroyed the first deed before it had been recorded for the purpose of putting the title back in Hupp, to the end that Hupp might convey the land to J. H. Potter in trust for the wife of said Baine. Applying the principles of law just stated, Baine would be estopped from setting up title under the destroyed deed; and these plaintiffs, claiming under him, are also estopped, unless the destruction of the first, and execution of the second, deed was a contrivance devised to defraud Baine's creditors. It would be absurd to say the plaintiffs cannot assail the whole transaction on the ground of fraud.

This brings us to the objection interposed by the defendants to the effect that the second deed cannot be overthrown on the ground of fraud in an action of ejectment. This objection is not well taken. If that deed was made to hinder, delay, or defraud the creditors of Thomas Baine, then it was and is void at law <sup>126</sup> as well as in equity, and such an issue may be tried in an action of ejectment as well as in a suit in equity to set aside the fraudulent conveyance. Where a debtor holding the legal title to land makes a conveyance thereof in fraud of his creditors, the purchaser at a sheriff's sale, made by virtue of a creditor's judgment, may sue in ejectment, and in such a suit he may defeat the fraudulent conveyance by proof of its fraudulent character. The fraudulent deed being thus declared void from the beginning, the sheriff's deed carries the title: *Chandler v. Bailey*, 89 Mo. 643; *Wait on Fraudulent conveyances, etc.*, 2d ed., sec. 51.

The next inquiry is whether the trial court should have declared the plaintiff's action barred by the statute of limitations. Baine and his wife were in possession of the land when the first deed was destroyed and the second one executed. This second deed conveying the land to J. H. Potter in trust for Evaline Baine, the wife of Thomas Baine, was recorded the 18th of May, 1867. Baine and wife continued in possession for more than ten years after that date. Indeed, they continued in possession by themselves and tenants down to 1888, when they executed the deed to the defendants.

*Rogers v. Brown*, 61 Mo. 189, was a suit in equity to set aside a conveyance made in fraud of creditors. It was held that the ten-year statute of limitations concerning real actions applied in that case, and that the statute begins to run in favor of the fraudulent grantee at least from the date of the record of the fraudulent conveyance. It was then said: "While the creditors of Collet acquired no right to institute any proceedings to set aside his fraudulent conveyance, prior to the date of their judgments against him, still, such right might have been acquired by them by the institution of attachment proceedings, based upon said <sup>127</sup> conveyance made by Collet with the intent to hinder and delay them in the collection of their debts (*Wagner's Statutes*, 192, sec. 51), and as they are chargeable by law with notice of the recorded conveyance, and could thereafter have instituted such proceedings, the statute must be held to have commenced to run against them on the twenty-sixth day of October, 1857, the day on which

the deed was recorded." The same rule must apply to this case. But we have no need to pursue this inquiry, for the real question here is, who had and held possession from and after the date of the deed from Hupp to the trustee? The plaintiffs say the possession of Baine and his wife was his possession under the destroyed deed; while the defendants say the possession was that of Mrs. Baine under the deed in trust for her use and benefit.

Where there are two or more persons in possession, each under a separate conveyance or color of title, the possession will be treated as being in him who has the better title. As there cannot be a concurrent seisin of the land, but may be a concurrent possession, the seisin is deemed to be in him who has the better title: 2 Wood on Limitations, 2d ed., see. 261. As between Thomas Baine and his wife, Evaline Baine, she had the better title. Indeed, as between them he had no evidence of title, or even of color of title. As has been before shown he was from and after the destruction of the first deed estopped from setting up any claim under it. The present case is, therefore, like that where husband and wife are in possession of land owned by the wife and to which he has no title whatever. That their possession in such a case would be the possession of the wife there can be no doubt. It follows that Mrs. Baine has had and held possession adverse to her husband and these plaintiffs, who claim under him, ever <sup>128</sup> since the record of the deed in trust for her use and benefit, namely, the 18th of May, 1867.

It appears from the evidence produced by the plaintiffs themselves, as well as that produced by the defendant, that she had such possession for a period much more than ten years. The trial court should, therefore, have given the defendants' instruction in the nature of a demurrer to the evidence. Because of this error the judgment is reversed without remanding the cause.

All concur.

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**DEED, SURRENDER OR DESTRUCTION OF—REVESTING OF TITLE—RETOPPEL.**—The surrender or destruction of a deed, unrecorded, even by mutual consent, does not revest the title in the grantor: *Watters v. Wapley*, 53 Ark. 509; 22 Am. St. Rep. 232. The grantee of land, by altering or destroying his title deed, does not lose his title to the land: *Van Hook v. Simmons*, 25 Tex. Supp. 323; 78 Am. Dec. 573. But if the grantee voluntarily, and without any misapprehension or mistake, consents to the destruction of the deed, with a view to revest the title, neither he, nor any other

person claiming by title subsequently derived from him, is to be permitted to show the contents of the deed so destroyed: *Sutton v. Jervis*, 31 Ind. 265; 99 Am. Dec. 631; *Gugine v. Van Gorder*, 10 Mich. 523; 82 Am. Dec. 55; *Parker v. Kane*, 4 Wis. 1; 65 Am. Dec. 283. And such surrender and destruction of an unrecorded deed may have the effect of divesting his title by estopping him from proving the contents: *Howard v. Huffman*, 3 Head, 562; 75 Am. Dec. 783; *Speer v. Speer*, 7 Ind. 178; 63 Am. Dec. 418; note to *Alexander v. Hickox*, 86 Am. Dec. 120.

**SECONDARY EVIDENCE, WHEN ADMISSIBLE.**—Before secondary evidence of the contents of a writing can be received it must be shown to have existed, to be lost or destroyed, to be without the jurisdiction of the court, or to be in the possession of the adverse party, who refuses to produce it, and that the party offering the secondary evidence has searched for, and used all reasonable diligence to procure, the original: See note to *Roach v. Priest*, 24 Am. St. Rep. 822; *Georgia Pac. Ry. Co. v. Strickland*, 80 Ga. 776; 12 Am. St. Rep. 282, and note.

**EJECTMENT—DEFENSES—FRAUD.**—Under the code practice an equitable defense may be set up as a defense to ejectment: *Prentiss v. Brewer*, 17 Wis. 635; 86 Am. Dec. 730, and note; *Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593; *Orary v. Goodman*, 12 N. Y. 266; 64 Am. Dec. 506, and note. Compare note to *Stocker v. Green*, 4 Am. St. Rep. 383.

**FRAUDULENT CONVEYANCES—CREDITORS.**—It is doubtful whether in some of the states a voluntary transfer can be upheld under any circumstances, when to uphold it is to prevent a creditor from obtaining payment of a pre-existing debt: See monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 739, 746, on voluntary conveyances.

**POSSESSION** follows the better title: See note to *Carson v. Burnett*, 30 Am. Dec. 154.

**HUSBAND AND WIFE—ADVERSE POSSESSION BETWEEN.**—A wife, though occupying land jointly with her husband, may, if she claims in her own right, under a conveyance, acquire a complete title by adverse possession after holding the land for the period prescribed by the statute of limitations: *Collins v. Lynch*, 157 Pa. St. 246; 37 Am. St. Rep. 722.

## **OLFERMANN v. UNION DEPOT RAILROAD COMPANY.**

[125 MISSOURI, 402.]

**APPEAL—CONFLICTING TESTIMONY.**—If the testimony of witnesses is conflicting it will not be considered on appeal.

**APPEAL—HARMLESS ERROR.**—If it appears from all the evidence that a witness testified fully as to all matters involved in questions propounded to him the fact that objections to certain of the questions were improperly sustained is harmless error.

**STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS.**—It is proper, in an action against a street railway company for injuries caused by a fall either in getting on a car or in getting off after it started, to instruct the jury that negligence cannot be presumed but must be proved, and that, though the plaintiff was injured in getting on or off defendant's car, such fact alone would not entitle him to recover, but he must prove

that he was injured as a direct consequence of the negligence of the defendant's employees.

**STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS.**—In an action against a street railway company for injuries caused by a fall either in getting on a car or in getting off after it started, and where there is evidence justifying the court in submitting the question of plaintiff's negligence in getting off the car as one of fact, it is not error to fail to state what facts, if found to be true, would constitute negligence on the part of plaintiff.

**STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS.**—If, in an action against a street railway company for injuries caused by defendant's negligence, an instruction has been given, at plaintiff's request, submitting the question of due care upon his part in getting on a car, he cannot complain because the court, at defendant's request, gives an instruction submitting the same question.

**TRIAL—IMPROPER REMARKS OF COUNSEL IN ARGUMENT.**—In an action by an elderly woman against a street-car company for ten thousand dollars damages for injuries occasioned by defendant's negligence it is error to permit defendant's attorney to say to the jury in argument: "Here is plaintiff suing for ten thousand dollars for personal injuries, when, if she had lost her life through defendant's negligence, her representatives could only recover five thousand dollars"; but, as such remark relates to nothing but the measure of damages, the error is harmless where the jury find that plaintiff is not entitled to recover in any amount.

**TRIAL—REMARKS OF COUNSEL.**—In an action for personal injuries occasioned by defendant's negligence, if the claim for damages seems exorbitant, though the injuries are serious, the jury, in giving weight to plaintiff's testimony, have a right to consider the fact as to whether he is prosecuting an exorbitant claim; and it is not an abuse of discretion for the trial court to permit defendant's attorney to remark, in argument, that there is "evidence of an attempt to make a large sum of money out of a comparatively trivial injury."

*Henry Kortjohn*, for the appellant.

*G. A. Finkelnburg*, for the respondent.

411 BLACK, P. J. This is an appeal prosecuted by the plaintiff from a verdict and judgment in an action for personal injuries sustained by the plaintiff while she was either getting on or off the defendant's street-cars operated by electricity.

According to the evidence of the plaintiff she and another lady, Mrs. Fricke, were on the east side of the street on which the plaintiff operates its cars. They saw a train composed of two cars coming, and the plaintiff signaled the motorman to stop. The train stopped after it passed a street-crossing. She and her friend passed behind the train to the west side of the street, so as to get on the rear car from the west side, that being the only side from which they could

enter the car. She says the car started just as she got one foot on the lower step and threw her down on the ground, inflicting the injuries of which she complains. Her account of the accident is supported by the evidence of Mrs. Fricke, though the latter made a written statement, at the request of the agents of defendant, shortly after the accident, which differs in some respects from her evidence given on the trial. They are both German women, advanced in years, and do not converse well in the English language, and this may account for the seeming conflicting statements of Mrs. Fricke.

The defendant produced three witnesses who were passengers on the same train. Two of them were standing on the rear platform of the rear car and were in a position to see what transpired. One of these witnesses testified that he saw the two women start towards the car, that plaintiff got on the step and from that to the platform. He says she then stepped back and jumped off after the train started, because she did not want to leave her companion, as he supposes. 412 The other of these witnesses testified that he saw the two women standing over on the street corner. One of them came across and got on the rear platform where he was standing, and was about to enter the car. She then looked back to the other one and said some thing in German and made a motion to come on. The other woman shook her head. Plaintiff then turned around and jumped off. He says the car had started at this time, and he thinks had moved eighty or ninety feet. The conductor of the train says he was on the outside of the motor-car, standing on the west side, that he stopped his train for passengers to get off, that he saw the plaintiff get up on the steps and he waited until she got up on the platform out of his view.

1. Counsel for plaintiff insists that the verdict is against the evidence and should be set aside for that reason; and in this connection he insists the evidence of the defendant's witnesses cannot be true. The value of this testimony was a question for the jury to determine. This court cannot deal with such questions when the evidence is conflicting, as it is here. The foregoing recital of the evidence is sufficient to show that the objection is not well taken. Indeed the verdict seems to be well supported.

2. During the examination of the plaintiff she was asked these questions: "When you hailed the car did you stop on the sidewalk or did you continue walking until you got near

the car?" "What did you mean by saying before, that you went in the car?" The defendant objected to these questions; to the first because leading, to the second because it called upon the witness to interpret what she had said, both of which objections were sustained.

The witness, in testifying through the medium of an interpreter, used language on several occasions <sup>413</sup> which evidently did not express what she desired to say. Under these circumstances the first objection might well have been overruled, for it is sometimes necessary to ask questions more or less leading, and we think the rule on this subject might have been relaxed as to this witness. The objection to the second question was not well taken and should have been overruled; for the witness had a right to explain what she meant by her answer to the former questions. But upon an examination of all of her evidence she testified as to these matters to the fullest extent, and this being so, the plaintiff has no ground of complaint.

8. For the plaintiff the court gave an instruction which, after reciting some matters now immaterial, concludes: "And that, in attempting to board said car, she used such diligence and exercised such care for her own safety as an ordinarily careful person would use under similar circumstances, and that said train of the defendant was set in motion by the servants of the defendant, before she could, by the exercise of reasonable care and diligence on her part, reach a place of safety on said car, and that by reason thereof she was thrown on the street and injured, then the jury will find for the plaintiff."

The court at the request of the defendant gave the following instructions:

"1. The court hereby instructs you that the ground of plaintiff's suit against this defendant is negligence, and that negligence cannot be presumed, but must be established by plaintiff to your satisfaction by proof: Therefore, although you find that the plaintiff was injured in endeavoring to get on or off of defendant's cars, yet that fact alone does not entitle the plaintiff to recover in this action, but before plaintiff can recover she is bound to prove to your satisfaction that she sustained the injury complained of in <sup>414</sup> direct consequence of the negligence of the defendant's employees in charge of the car, and, unless the plaintiff has so proven, your verdict must be for the defendant.



"2. If you find from the evidence that the direct cause of plaintiff's fall upon the street was negligence of her own, either in the manner of boarding the car or in trying to step off the train after it had started and while the same was in motion, and that her fall was not due to negligence on the part of defendant's employees, then your verdict should be for the defendant."

If the first of these instructions, given at the request of the defendant, told the jury, in effect, that negligence could not be inferred from the circumstances, as is contended by the plaintiff, then it was error to give it; but it is not open to such construction. It does not say negligence cannot be inferred from circumstances. It simply says negligence cannot be presumed, but must be proved; that is to say, proved like any other issue of fact. It permits the plaintiff to show negligence on part of the defendant by any competent evidence.

Nor is this instruction objectionable because it says the sole fact that plaintiff was injured while endeavoring to get on or off the car does not entitle her to recover. The question of negligence is still left as one for the jury to determine on all the evidence. There are cases where it is sufficient, to make out a *prima facie* case, to show the relation existing between the parties, the situation of the plaintiff, and that plaintiff was injured: 2 Thompson on Negligence, 1227. But it cannot be said this case comes within that class. So, in many cases the proof, which discloses loss or injury, will at the same time disclose attending circumstances from which negligence may be inferred: *Whitting v. St. Louis etc. Ry. Co.*, 101 Mo. 631; 20 Am. St. Rep. 636; *Otis County v. Missouri Pac. Ry. Co.*, 112 Mo. <sup>415</sup> 632. But this instruction does not exclude the attending circumstances; nor does it say evidence of that character will not support a verdict for plaintiff.

The further objection is made to the defendant's first and second instructions, that they do not inform the jury what will constitute negligence. The objection we are now to consider is not that these instructions fail to define negligence by saying it is that want of care which a prudent person would use under like circumstances, but the objection is this, that the instructions do not say what facts, if found to be true, will constitute negligence. There are cases where it is proper for the court to instruct the jury that certain facts

constitute negligence or contributory negligence, as the case may be, thus making the question of negligence one of law rather than one of fact. But, in general, the question is one of fact, to be determined by the jury under all the evidence. In this case the court might well have told the jury, that if the plaintiff, after getting on the car platform in a place of safety, and after the train had started, turned around and jumped off, and thereby received the injuries of which she complains, then she could not recover. There was, however, also evidence in the case which justified the court in submitting the question of negligence on her part in getting off as one of fact. The plaintiff's instruction, it is to be observed, submits the question of negligence on her part in getting on, as one of fact, and not of law.

The second instruction is faulty, it is argued, because it allows the jury to find negligence on the part of the plaintiff "in the manner of boarding the car," when there was no evidence of negligence on her part in that respect. But a sufficient answer to this objection is, that plaintiff caused the court to submit this very question to the jury by the instruction given at <sup>416</sup> her request. The question of due care on her part in getting on the car having been submitted to the jury at her request, she cannot complain because the defendant adopted the same theory, namely, that there was some evidence of want of due care on her part in getting on the car.

If we take all the instructions together, including the third given at the request of the defendant, and as to which no objection was made, they submit fairly the two issues in the case, that is to say, whether the plaintiff was injured in getting on the train because it started before she had time to get on in safety, or whether she was injured because she jumped off the train after she had reached a place of safety and after the train had started. As these two issues were fairly and fully submitted we cannot see that the plaintiff has any just ground of complaint. The second instruction given at the request of the defendant might well have been omitted, but with the third given it could not have operated to the prejudice of the plaintiff.

4. Counsel for defendant in discussing the question as to the amount of damages to be allowed, if the jury should find for the plaintiff, said: "Here is the plaintiff suing for ten thousand dollars for personal injuries, when, if she had lost

her life through the negligence of the defendant, her representatives could only recover five thousand dollars." Counsel for plaintiff objected to these remarks. The court, instead of administering a rebuke, said, "Go on. He has a right to allude to this, because such is the law." Counsel for defendant continuing said: "Is not the fact that the plaintiff demands ten thousand dollars in this case for a comparatively slight injury evidence of an attempt on her part to make a large sum of money out of a comparatively trivial injury? I refer to it because you have got to weigh the testimony in this case, and Mrs. Olfermann's objects and connection with this suit, <sup>417</sup> and the position she has taken with reference to it, weighs in the scale."

The statute, in giving to the representatives of a deceased person a cause of action where they had none before, limits the recovery to five thousand dollars, but the limit placed upon the amount of recovery in such cases has nothing whatever to do with the measure of damages in a common-law action like this. The court erred in approving the reference made to this statutory measure of damages. But the error is immaterial here, because the remark related to nothing but the measure of damages, and the jury found the plaintiff was not entitled to recover in any amount. With this finding we cannot see how the plaintiff was prejudiced. It would be useless to send the case back because of such an error, the jury having found on proper instructions that plaintiff ought not to recover in any sum.

The other alleged improper remarks have some bearing on the weight to be given to the evidence of the plaintiff. They cannot, therefore, be disposed of on the ground just stated. According to the evidence of the physician the plaintiff received a fracture of the hip joint. She still used crutches at the date of the trial, and the injury is probably of a permanent character, considering her age. Though the injury was serious, still the claim for ten thousand dollars damages has some appearance of being exorbitant. If the jury believed that she was prosecuting an exorbitant claim, then they had a right to consider that fact in determining what weight they would give to her evidence. The extent to which counsel may go in argument to the jury, in matters like this, must be left to a large extent to the discretion of the trial court. We cannot say that there was any abuse of that discretion so far as the <sup>418</sup> remarks now under consideration

are concerned. There is no such error in this record as to justify a reversal, and the judgment is therefore affirmed.

All concur.

**APPEAL.**—The appellate court will not weigh evidence where it is conflicting: Note to *Bohannon v. Combs*, 10 Am. St. Rep. 330. Error without prejudice will be disregarded on appeal: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421.

**STREET RAILWAYS.—NEGLECT.—INSTRUCTIONS.**—The general rule seems to be that negligence is presumed from the happening of a railway accident resulting in an injury to passengers, and that the burden of proof lies on the railroad company to rebut such presumption: *Spellman v. Lincoln Rapid Transit Co.*, 38 Neb. 890; 38 Am. St. Rep. 753, and note; *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65, and note; *Volkmar v. Manhattan Ry. Co.*, 134 N. Y. 418; 30 Am. St. Rep. 678, and note; *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800; though some of the authorities are the other way: See monographic notes to *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736; *Philadelphia etc. R. R. Co. v. Anderson*, 20 Am. St. Rep. 490; *Uggle v. West End St. Ry. Co.*, 160 Mass. 351; 39 Am. St. Rep. 481; and there seems to be room for doubt whether the rules of evidence which are applicable where a passenger is injured can properly be adopted for the purpose of determining upon which side the burden of proof lies, where goods are lost or damaged: See note to *Long v. Pennsylvania R. R. Co.*, 30 Am. St. Rep. 736. In *Hawkins v. Front St. Cable Ry. Co.*, 3 Wash. 592; 28 Am. St. Rep. 72, it was held that the fact that a passenger on a cable-car in a city is injured without fault of his own does not raise a presumption of negligence, casting the burden of proof on the railway company to disprove it. To recover in an action for negligence the negligence must be the cause of the injury: *Gibson v. Leonard*, 143 Ill. 182; 36 Am. St. Rep. 376. Alighting from a street-car while it is moving is not necessarily negligence as a matter of law: *Ober v. Crescent City R. R. Co.*, 44 La. Ann. 1059; 32 Am. St. Rep. 366, and note.

**TRIAL.—ARGUMENT.**—As to when improper remarks of counsel are so serious as to call for a reversal of judgment: See monographic note to *McDonald v. People*, 9 Am. St. Rep. 559-570. The discretion of the court, however, regarding the conduct of counsel in argument will rarely be reviewed: Note to *Bullard v. Boston etc. R. R.*, 10 Am. St. Rep. 377.

## HEINRICH v. CITY OF ST. LOUIS.

[125 MISSOURI, 424.]

**MUNICIPAL CORPORATIONS.—LIABILITY FOR VACATING STREETS.**—While a city has power to vacate streets it is liable for damages to abutting property owners arising from the exercise of that power, including loss from depreciation in value, and it is no defense to an action for such damages that the owner still has access to his property by another street.

**MUNICIPAL CORPORATIONS.—MEASURE OF DAMAGES FOR VACATING STREETS.** In an action by an abutting property owner to recover damages sustained because of a depreciation in the value of his property, caused

by the vacation of a street, the measure of damages is the value of the property just before the street was vacated and its value thereafter.

**MUNICIPAL CORPORATION—VACATION OF STREETS—REVERSION OF FEE.—**

Upon the vacation of a street the abutting owner is entitled to the exclusive ownership and use of the strip which was before a part of the street and subject to the public easement.

**DAMAGES, MEASURE OF—INSTRUCTIONS—PRESUMPTION ON APPEAL.—**If no instructions, in an action for damages, were asked or given as to the measure of damages, it will be presumed on appeal that the trial court adopted the correct rule.

*W. C. Marshall*, for the appellant.

*O. P. & J. D. Johnson*, for the plaintiff in error.

426 **BLACK, P. J.**—The plaintiff is the owner of a parcel of land in the city of St. Louis, two hundred feet in length from north to south, and fifty-three feet wide, measuring at right angles to the side lines. The north end fronts on what was formerly Olive street. That street ran in a southeast and northwest direction, so that the lot had a front of sixty feet, measuring along the south line of Olive street. The south end of the lot does not front on any street. The west side line extends along the east line of Taylor avenue. There is also an alley running east and west across the lot.

In March, 1890, the city, by an ordinance duly enacted, vacated a part of Olive street, including therein the part on which the plaintiff's property abutted.

427 This is a suit to recover the damages sustained because of a depreciation in the value of the property, caused by the action of the city in vacating that part of Olive street. The court gave judgment for plaintiff, from which the defendant appealed. Plaintiff sued out a writ of error. The two cases will be treated as one, the same as in case of cross-appeals.

1. The municipal assembly of the city of St. Louis has the power conferred upon it to vacate streets and alleys; and it is for the assembly, and not the courts, to say when that power shall be exercised. As the city has this power, it is insisted, on its behalf, that the vacation of one street affords no ground of complaint where the property owner still has access to his property by another street or alley, and hence the defendant's demurrer to the evidence should have been sustained.

Though the city has the right and power to vacate streets when and where its legislative body shall deem best for the public good, still it does not follow that the city is not liable

for damage resulting to abutting property owners, arising from the exercise of that power. The power must be exercised subject to the constitution, which provides that private property shall not be taken or damaged for public use without just compensation. In the case of *Glasgow v. St. Louis*, 107 Mo. 202, we held injunction would not lie to restrain the enforcement of an ordinance vacating a part of a street, at the instance of persons whose property did not abut on the vacated portion of the street. But it was said in that case: "There is no doubt but a property owner has an easement in a street upon which his property abuts, which is special to him and should be protected." While the owner of a lot abutting on a public street has the same right to the use of a street that rests in the public he at the same time has other <sup>428</sup> rights which are special and peculiar to him, and the right of ingress and egress is one of them. This right of access is appurtenant to his lot, and is private property. To destroy that right is to damage his property, and when this is done for the public good the public must make just compensation therefor. All this flows as a necessary consequence from what was said in *Glasgow v. St. Louis*, 107 Mo. 202, and we do not feel called upon to enter upon a further review of the cases on this subject. Some things must be taken as settled by former adjudications.

It is suggested that the plaintiff may still use his half of the vacated portion of the street in front of his lot, that is to say, a strip thirty feet wide extending along the north end of his lot from Taylor avenue, as a private way, if he desires to do so. This he may do beyond all doubt, but it is no answer to this complaint. The thing of which he has been deprived for the public good is direct access to a public highway, not simply to a private way. The most casual observation will show that the value of these small parcels of land in cities depends upon the fact that they abut on a public thoroughfare. It is this which gives them so much value.

Nor does the fact that plaintiff has direct access to his property from Taylor avenue and the alley defeat this action. The fact that he has such access is one to be considered in estimating the damages to be awarded, for it is manifest the damages are not as great as they would be if the property had no side street. But the plaintiff is still entitled to recover whatever damages he sustained by the vacation of the street. This is too clear to call for further observation.

2. On the part of the plaintiff it is insisted the court erred "in deducting from the damages proved," <sup>429</sup> the value of the portion of the vacated street which reverted to him.

It seems to have been conceded on the trial that plaintiff owned to the center of Olive street, which was sixty feet wide. When the street was vacated the plaintiff became entitled to the exclusive ownership and use of this strip of thirty by sixty feet which was before a part of the street and subject to the public easement. To determine the damages sustained by the plaintiff the inquiry should be, What was the value of the entire lot, just before the street was vacated, the thirty feet being in the street; and what was the value of the lot thereafter, the thirty feet being freed of the street easement. The difference in favor of plaintiff would be the amount of damages.

Now, evidence was produced sufficient to enable the court to estimate the damages on the basis just suggested. No instructions were asked or given, so we are not informed what rule for measuring the damages the court adopted, but the presumption is that the court adopted the correct rule, and this presumption must prevail as this record presents this case. It is true the court heard some evidence as to the value of this strip of thirty by sixty feet taken by itself, but no objection was made to it until long after it had been admitted, and no motion was made at any time to strike it out. The evidence having been received without objection, the plaintiff should have moved to exclude it. As this was not done, the admission of the evidence cannot be assigned as error here, and hence it is useless to discuss the question whether or not the evidence was properly admitted.

The judgment is affirmed.

All concur.

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**APPEAL.**—The rulings and judgment of the trial court are presumed to be correct in the absence of positive error appearing in the abstract: *Dowagiac Mfg. Co. v. Gibson*, 73 Iowa, 525; 5 Am. St. Rep. 697, and note.

**DAMAGES FOR VACATION OF STREET**—POWER TO VACATE.—The legislature, in the absence of special constitutional restrictions may, by virtue of its plenary power, vacate or discontinue streets or highways, or authorize municipal corporations to do so: *Polack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490; *Meyer v. Village of Teutopolis*, 131 Ill. 552; *McGee's Appeal*, 114 Pa. St. 470; *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625; *City of Marshalltown v. Forney*, 61 Iowa, 578; *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649. And in some jurisdictions it is held that the legislature has the power to vacate a public

street without the consent of those whose private interests may be affected by it and without providing for compensation for the injury: *Paul v. Carter*, 24 Pa. St. 207; 64 Am. Dec. 649. Public streets and highways belong to the state, and a city may, under its charter, or by virtue of other statutory authority, do any thing with its streets not incompatible with the end for which streets are established: *City of Mt. Carmel v. Shaw*, 155 Ill. 37; *ante*, p. 311; *Meyer v. Village of Teutopolis*, 131 Ill. 552; *McGee's Appeal*, 114 Pa. St. 470; *City of Marshalltown v. Forney*, 61 Iowa, 578; and equity will interfere by injunction to restrain the attempted vacation of a road or street only when private owners have a special interest therein, and their property would be directly injured by the vacation: *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625; *Gray v. Iowa Land Co.*, 26 Iowa, 387; *Meyer v. Village of Teutopolis*, 131 Ill. 552; *Williams v. Carey*, 73 Iowa, 194. The fact that the general course of travel will probably be thrown on some other street, and no longer pass in front of a lotowner's property, will not justify the issue of an injunction in such a case: *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625; nor will the property owner's claim that he is interested in keeping open the street justify the issue of an injunction: *Meyer v. Village of Teutopolis*, 131 Ill. 552; *Gray v. Iowa Land Co.*, 26 Iowa, 387. The power or discretion of the city, in such cases, must be manifestly abused to the oppression of the citizen before equity will interfere: *City of Mt. Carmel v. Shaw*, 155 Ill. 37; *ante*, p. 311. After the power to vacate a street has been delegated to municipal authorities the legislature may revoke it in part, as well as in whole, or, without any express revocation, may itself exercise the power: *Polack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490. The legislature may vacate a portion of a street, even if a person owns property fronting on another portion of the street which will incidentally be injured thereby: See case last cited. And, under the power given by statute to a city to vacate streets, it may vacate a strip upon each side of the street so as to narrow it, where the purpose of narrowing is not to benefit private owners, but to decrease a needless width of street for the public benefit: *City of Mt. Carmel v. Shaw*, 155 Ill. 37; *ante*, p. 311. An act of vacation, however, under a statute authorizing a city to vacate streets and alleys cannot be said to be *ultra vires*, because it is done for the benefit of a private individual: *City of Marshalltown v. Forney*, 61 Iowa, 578. By virtue of the statute a street or alley may be vacated by ordinance without notice to the owners of abutting property: *Dempsey v. City of Burlington*, 66 Iowa, 687; but municipal authorities cannot vacate a street without the consent of the legislature: *Polack v. Trustees of San Francisco Orphan Asylum*, 48 Cal. 490; and a highway can be vacated only in the way prescribed by the statute. Nothing done toward that end, in any other way, can affect the public right: *Miller v. Town of Corinna*, 42 Minn. 391. Where the power to vacate a street is vested in the municipal authorities alone a court of quarter sessions cannot exercise it: *In re Vacation of Osage Street*, 90 Pa. St. 114. Whether a street shall be kept open or vacated is wholly a question of expediency. It is not a judicial question but one for the city's legislative authority: *Glasgow v. St. Louis*, 107 Mo. 198; *City of Mt. Carmel v. Shaw*, 155 Ill. 37; *ante*, p. 311; *Heller v. Atchison etc. R. R. Co.*, 28 Kan. 625. And the validity of a proceeding vacating a street is not affected by the fact that the land embraced in the street thereby becomes private property, nor by the fact that the vacation is made for the purpose of vesting the title to such land in the adjoining owners. The motives actuating the city authorities in ordering the vacation being immaterial cannot be shown



in evidence in a proceeding to assess the damages to a property owner caused by the vacation: *Meyer v. Village of Teutopolis*, 131 Ill. 552. If a city has power to vacate streets it makes no difference in the exercise of that power whether the public acquired the street to be vacated by condemnation or by dedication: *Glasgow v. St. Louis*, 107 Mo. 198.

WHAT BECOMES OF THE FEE.—One who owns lands abutting upon a street or highway owns to the center thereof, unless special circumstances show the contrary; and the general rule is that, upon its abandonment, vacation, or discontinuance, the land covered by it reverts to the original owner of the fee or his grantees: *Wallace v. Fee*, 50 N. Y. 694; *Atchison etc. R. R. Co. v. Patch*, 28 Kan. 470; *Van Amringe v. Barnett*, 8 Bos. 357; *Benham v. Potter*, 52 Conn. 248; *Burmester v. Howard*, 1 Wash. Ter. 212; *Gebhardt v. Reeves*, 75 Ill. 301; *Dunkham v. Williams*, 36 Barb. 136; *West Covington v. Freking*, 8 Bush, 121. The conveyance of land bounded on a street or highway ordinarily carries the fee to the center thereof, subject to the public easement, unless it is expressly or by clear implication reserved or the fee of the street or highway is in the city, county, or other corporate authority: *Hamilton v. Chicago etc. R. R. Co.*, 124 Ill. 235; *Banks v. Ogden*, 2 Wall. 57; *Thomsen v. McCormick*, 136 Ill. 135; and no distinction in this respect is made between the streets of a city and county highways: *Bissell v. New York Cent. R. R. Co.*, 23 N. Y. 61. This rule with respect to highways subserves the public good by preventing the existence of strips of land of no great value, formerly a part of the highway, but the abandonment of which would induce profitless and vexatious litigation: *Gebhardt v. Reeves*, 75 Ill. 301, 307. If, however, a person over whose land a highway is laid out conveys the land on each side of it, describing it by such boundaries as do not include the road, or any part of it, the property in the road does not pass to the grantee, as it is excluded by the description in the deed. It does not pass as an incident, being in itself a distinct parcel of land; and the fee of one piece of land not mentioned in a deed cannot pass as appurtenant to another: *Jackson v. Hathaway*, 15 Johns. 447; 8 Am. Dec. 263. Land cannot be appurtenant to land, and the soil and freehold of closed-up streets will not pass with a conveyance of the abutting lands under and by virtue of the term "appurtenances": *Harris v. Elliott*, 10 Pet. 25. Much, therefore, depends upon the words of the deed, the intent of the parties, and the peculiar circumstances of the case, in determining the effect of the grant.

If a street or highway is acquired by a common-law dedication, or user, the fee remains in the original proprietor or his grantees, burdened with the public easement, and upon a vacation thereof reverts to them: *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Gosselin v. City of Chicago*, 103 Ill. 623; *Thomsen v. McCormick*, 136 Ill. 135; *Banks v. Ogden*, 2 Wall. 57. But a statutory dedication operates as a conveyance and vests the legal title to the soil of the streets in the city: *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624; *Gosselin v. City of Chicago*, 103 Ill. 623; *Hunter v. Middleton*, 13 Ill. 50; *Canal Trustees v. Haven*, 11 Ill. 554; *City of La Salle v. Matthiessen*, 16 Ill. App. 69.

The grantee of a lot bounded upon a street, the fee of which is in the city, acquires nothing beyond the boundaries of his lot: *Burbach v. Schweitzer*, 56 Wis. 386; *St. John v. Quitman*, 72 Ill. 334; *Gebhardt v. Reeves*, 75 Ill. 301; and where a street, the fee of which is in the city, is vacated and its use abandoned, the fee that was in the city will, it is held in Illinois, revert to the original owner who dedicated the same, and not to the abutting

lotowners, and neither the legislature nor the corporate authorities can divest such owner of it: *Gebhardt v. Reeves*, 75 Ill. 301; *Village of Hyde Park v. Borden*, 94 Ill. 26; *City of La Salle v. Matthiessen*, 16 Ill. App. 62. In Iowa the title, in such cases, does not revert to the original owners: *Day v. Schroeder*, 46 Iowa 546; while in Nebraska it is held that a city, possessing the absolute title to its streets and the power to vacate them, may, upon regularly vacating a street for the public good, and after a tender of fair damages to the abutting owners, grant or sell the land thus vacated to private parties, as the title thereto does not revert to the abutting owners: *Lindsay v. City of Omaha*, 30 Neb. 512; 27 Am. St. Rep. 415. Of course, if the owner of property platted in lots and streets sells a lot, and reserves the right to vacate the streets, it is equivalent to a reservation of all his title thereto, and the purchaser of the lot will not acquire title to any part of the street on which it abuts in case it is afterward vacated: *St. John v. Quitsow*, 72 Ill. 334; and in Illinois, if a party, in conveying land to a city for a street, provides in his deed that, when the same shall cease to be used as a street, or the street shall be abandoned or vacated, it shall revert to the grantor, his heirs, or assigns, the land, upon a vacation of the street, will pass back to such grantor or his assigns, by virtue of such clause, and also upon general principles, without such a reservation: *Helm v. Webster*, 85 Ill. 116.

The right of damages for injuries to the owner of adjoining premises by the closing of a highway is personal and accrues and vests in the owner immediately upon the closing, although not fixed and ascertained until after a subsequent conveyance of the premises. It does not pass with the land unless in terms embraced in the deed of conveyance. It is a mere right of action not running with the land: *King v. Mayor*, 102 N. Y. 172.

**RECOVERY OF DAMAGES.**—The benefits to be received by a person whose land is taken for a road or street are a part of the consideration for the release of the land, or its condemnation for that purpose, and, when once vested in him, or he becomes entitled thereto, are as much his property as the land itself, and neither the state nor any of its subordinate agencies can deprive him of them without notice, a finding of public necessity, and compensation ascertained by a constitutional jury. The term, "taking," found in the constitution should not be used, says Sherwood, C. J., in *Pearall v. Supervisors*, 74 Mich. 558, in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only, but should include cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or where the owner is excluded from its enjoyment, or from any of its appurtenances. If the public take any action which becomes necessary to subserve public use, and valuable rights of an individual are thereby interfered with, and damaged or destroyed, he is entitled to the compensation which the constitution gives therefor, and such damage or destruction must be regarded as a "taking": *Pearall v. Supervisors*, 74 Mich. 558. Hence, the discontinuance of a state road is a "taking" of private property, it has been held, and the injured party is entitled to an appropriate remedy: *Pearall v. Supervisors*, 74 Mich. 558. And, where a city, possessing the power, vacates one of its streets the abutting owners have been held entitled to damages for the injury sustained thereby; and, if one of them sustains special injury in excess of that suffered by the community at large, he is entitled to damages therefor; but it will be presumed, in the absence of evidence to the contrary, that the damages tendered by the city are adequate for that purpose:

*Lindsay v. City of Omaha*, 30 Neb. 512; 27 Am. St. Rep. 415. It has also been held that the closing of an unimproved street, which is practically impassable for vehicles, so as to compel an abutting landowner to take a circuitous route to reach his premises, is actionable, as he suffers what the law terms "special damage": *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527. In Pennsylvania it is held that the legislature has the power to vacate a public street without the consent of those whose private interests may be affected by it, and without providing for compensation for the injury: *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649. This is upon the principle that public streets and highways belong to the state; and, when the government sees fit to vacate them, the consequential loss, if there is any, must be borne by those who suffer it: *McGee's Appeal*, 114 Pa. St. 470; *Paul v. Carver*, 24 Pa. St. 207; 64 Am. Dec. 649. Hence, in that state, upon the lawful vacation of a street, and the appropriation of the ground by a railroad company, the owners of the abutting property cannot, in the absence of any special legislative provision for damages in such cases, invoke the aid of the constitutional provisions that compensation shall first be made for property taken, injured, or destroyed: *McGee's Appeal*, 114 Pa. St. 470. So it is held in Iowa that the vacation of an alley, street, or other highway, does not take from an individual residing thereon his property either for public or private use, and that he cannot recover damages therefor, although he may sustain inconvenience therefrom: *Barr v. City of Oakalooosa*, 45 Iowa, 275; *Williams v. Carey*, 73 Iowa, 194. It is there said in an action to enjoin such vacation that "an abutting lotowner cannot arbitrarily object to the vacation of a street, or part of a street, nor can he, upon slight grounds, prevent the accomplishment of that which is a material benefit to the general public; and that the conclusion of the city council will, ordinarily at least, be conclusive as to the question whether the vacation of a street is for the public good." The court does not announce an absolute rule that in no case can an abutting owner have damages upon the vacation of a street, but they must be more than imaginary: *Williams v. Carey*, 73 Iowa, 194. A complaint by an abutting lotowner, against a municipal corporation, to recover damages for the vacation of a street does not state a cause of action, where the only act complained of is the passage, by the city council, and the subsequent approval by the mayor, without the consent of the plaintiff, and without any compensation to him, of a resolution or ordinance declaring a part of a certain street abandoned and vacated: *Hiescher v. City of Minneapolis*, 46 Minn. 529. An act closing a street in the city of New York is not unconstitutional because it does not provide a compensation to the owners of adjoining lands, who are deprived of a right of way therein, if another street is left giving access to such lands. The owners in such a case sustain no actionable damage: *Fearing v. Irwin*, 55 N. Y. 486. Other cases hold that the discontinuance of a street or highway gives no right to the owner of land not abutting on the street or highway discontinued, and still accessible by other ways, to recover damages: *Smith v. City of Boston*, 7 Cush. 254; *Castle v. County of Berkshire*, 11 Gray, 26; *City of East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795, reversing same case, 19 Ill. App. 64. One who simply suffers an inconvenience in common with all other persons from the vacation of a street or highway, but no special injury to himself, has no cause of action: *Glasgow v. St. Louis*, 107 Mo. 198; *Kittle v. Fremont*, 1 Neb. 329; *Stout v. Noblesville etc. Road Co.*, 83 Ind. 466. The principle seems to be that, for an injury to, or an obstruction of, a public and common right no private action will lie for damages of the same kind as

those sustained by the general public, although the private injury is much greater in degree. This is the reason why a lotowner in a city cannot maintain an action against the city for the vacation of a portion of a public street not bordering upon his lot, and not necessary to afford him access thereto. The damage, in such a case, to his lot, though in a greater degree, is of the same nature as that to all other property in the city: *City of East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795. There is no cause of action for the depreciation in the value of property resulting from alterations and changes made in the neighborhood, for a public purpose, and which have been authorized by law: *Coster v. Mayor*, 43 N. Y. 399; *Hinchman v. City of Detroit*, 9 Mich. 103; *Williams v. Carey*, 73 Iowa, 194; and town authorities are not liable in damages for discontinuing a way which is not a legal townway or highway: *Bames v. Northumberland*, 44 N. H. 67; *Perry v. Inhabitants of Sherborn*, 11 Cush. 388. A person through whose land an established highway is sought to be vacated is sometimes authorized by statute to recover such damages as he may sustain by the vacation: *Cook v. Quick*, 50 Ind. 537; *Petition of Concord*, 50 N. H. 530; but no substantial damages can be recovered by one for an injury to his property rights, without evidence furnishing a basis for a money estimate: *Sheedy v. Union Press Brick Works*, 25 Mo. App. 527; and, in a proceeding to assess damages growing out of the vacation of a public street, the court, in order to make its judgment effective, must act upon the verdict of the jury. An entry of judgment as follows: viz., "Judgment rendered upon the verdict of the jury," is fatally defective: *Meyer v. Village of Teutopolis*, 131 Ill. 552. If a railway company is authorized by ordinance to build its road within a part of a street which is thereby legally vacated the city cannot be held liable to a lotowner whose property is not adjacent to the vacated street, for any act done by the company not authorized by such ordinance: *City of East St. Louis v. O'Flynn*, 119 Ill. 200; 59 Am. Rep. 795. Parol testimony that a street has been abandoned is not admissible to prove that it has been vacated, for that is properly a matter of record: *Lathrop v. Central Iowa Ry. Co.*, 69 Iowa, 106.

## MARKOWITZ v. KANSAS CITY.

[125 MISSOURI, 485.]

**MUNICIPAL CORPORATIONS—STREET GRADE—DAMAGES—REMEDY.**—An ordinance, authorized by statute, and providing for the ascertainment and collection of damages sustained by an abutting property owner from the grading of a street does not exclude his constitutional remedy to obtain compensation for land taken for public use. Such remedy is merely cumulative.

**MUNICIPAL CORPORATIONS—STREET GRADE—DAMAGES—EVIDENCE.**—In an action by an abutting lotowner for damages caused by grading the street in front of his premises the value of the property may be shown by evidence of what lots in the same locality sold for at the time; and evidence of the cost of material used in constructing a house erected on the lot is also competent for the same purpose.

**APPEAL—INSTRUCTIONS.**—An error in a particular instruction is harmless if all the instructions, taken together, fairly present the case to the jury.

*F. F. Rozzelle and Clarence S. Palmer*, for the appellant.

*Edward H. Stiles and E. L. Noyes*, for the respondent.

<sup>488</sup> **BURGESS, J.** This is an action for damages to plaintiff's property, alleged to have been caused by defendant by grading Jefferson street, in Kansas City, from Twenty-seventh street to the southern limits of said city, under an ordinance approved May 12, 1888. The work was done under a contract dated July 12, 1888. On April 19, 1889, defendant passed an ordinance defining the benefit district within which property should be charged with the payment of damages occasioned by such grading. Plaintiff's property was in said district.

Prior to the institution of this suit plaintiff had brought a suit against defendant for the same cause of action, which he subsequently dismissed, but no point is made upon that fact in this court.

Defendant, in its answer, alleged that, previous to the time of the grading, plaintiff had given a deed of trust on the property, which had been foreclosed, and the property sold to a third person. A demurrer was filed by plaintiff, and sustained, to all of the allegations in defendant's answer, except the general denial. The trial resulted in a verdict and judgment for plaintiff in the sum of eleven hundred dollars, from which defendant appealed.

Defendant's first contention is that, as before this suit was brought and after the grading had been completed it had, in pursuance of the provisions of an act of the general assembly, entitled "An act to provide for the ascertainment of, and payment for, damages done by municipal corporations to private property for public use, as directed by section 21 of article 2 of the state constitution," approved March 26, 1885 (Laws of 1885, p. 47), and an act amendatory thereof, approved March 31, 1887 (Laws of 1887, p. 87), defendant passed an ordinance prescribing the district in which property should be deemed especially benefited by the grading of said street, and prescribing a mode for the assessment and the collection of damages sustained by property <sup>489</sup> owners by reason thereof, the mode thus prescribed was exclusive, and this action is not maintainable.

In *Hickman v. City of Kansas*, 120 Mo. 110, 41 Am. St. Rep. 684, which was an action for damages to plaintiff's property, occasioned by a change of the grade of a street in

said city, by virtue of an ordinance passed in pursuance of said acts of the legislature, it was held, contrary to defendant's contention, that the right of action being conferred by section 21, article 2, of the state constitution, which is self-enacting, the remedy prescribed by the ordinance was not exclusive. Brace, J., speaking for the court, said: "The rule is, that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law, this does not take away the common-law remedy, but the party may still sue at common law as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative. But where a new right, or the means of acquiring it, are given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy": See, also, *State v. Bittinger*, 55 Mo. 596; *Lindell v. Hannibal etc. R. R. Co.*, 36 Mo. 543; *Soulard v. St. Louis*, 36 Mo. 546.

Over the objection of defendant a witness by the name of E. L. Noyes was permitted to testify, as tending to show the value of the lot in controversy, what other lots in the same locality, just across the street, had been selling for, and in admitting this evidence it is claimed that the court committed error. There are a number of respectable authorities who hold that such evidence is inadmissible, notably: *East Pennsylvania R. R. Co. v. Heister*, 40 Pa. St. 53; *Pennsylvania etc. R. R. Co. v. Bunnell*, 81 Pa. St. 414; *Pittsburgh etc. Ry. Co. v. Vance*, 115 Pa. St. 325; *Stinson v. Chicago etc. Ry. Co.*, 27 Minn. 284; *Central Pac. R. R. Co. v. Pearson*, 35 Cal. 247; <sup>400</sup> *Matter of Thompson*, 127 N. Y. 463; *Hunt v. Boston*, 152 Mass. 168. But the great weight of authority is clearly the other way.

In *Town of Cherokee v. Town Lot and Land Co.*, 52 Iowa, 279, it was held that evidence of the price at which other tracts of land in the same neighborhood had been sold at or near the time the value was being fixed on the land in controversy was admissible for the purpose of showing its value, the difference in location, character, and value between them and the tract in question being shown: See, also, *Culbertson etc. Co. v. Chicago*, 111 Ill. 651; *St. Louis etc. R. R. Co. v. Haller*, 82 Ill. 208; *Chicago etc. R. R. Co. v. Maroney*, 95 Ill. 179; *Shattuck v. Stoneham etc. R. R. Co.*, 6 Allen, 115; *Edmands v. Boston*, 108 Mass. 535; *Watson v. Milwaukee etc. Ry.*

Co., 57 Wis. 332; *Washburn v. Milwaukee etc. Ry. Co.*, 59 Wis. 364; *Paine v. Boston*, 4 Allen, 168; *Truitt v. Baird*, 12 Kan. 420.

Whatever the rule may be in other jurisdictions it was held in a recent decision of this court, *St. Louis etc. Ry. Co. v. Clark*, 121 Mo. 169, which was a proceeding to condemn land for the right of way for railroad purposes, that evidence of sales of similar property to that in question in the same neighborhood, made about the same time, was admissible as tending to show the value of the land sought to be condemned.

Nor do we think the court erred in permitting the same witness, over the objection of defendant, to testify to bills paid by himself, and saw paid by others, toward the construction of plaintiff's house situated on his lot, as such evidence was competent as tending to show the value of the property.

A final contention is that there was error committed in giving the second instruction as to the measure of damages, inasmuch as it did not confine the consideration of the jury to the difference in value of the lot caused by the defendant. Whatever of vice in this <sup>491</sup> regard existed in that instruction was cured by the first instruction given at the request of defendant, by which the jury were told that the only thing for them to determine was the difference in market value of the property after the grading, and caused solely by the grading. Taken altogether, the instructions presented the case fairly to the jury. The case seems to have been well tried, and the judgment should be affirmed.

It is so ordered.

All of this division concur.

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**MUNICIPAL CORPORATIONS—STREET GRADE—DAMAGES—REMEDIES.**—If property is damaged by establishing the grade of a street compensation is recoverable therefor under a constitution declaring that private property shall not be taken or "damaged" for public use without just compensation. Such a provision is self-enforcing, and the remedy provided may be enforced by a common-law action: *Hickman v. City of Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684; monographic note to *O'Brien v. Philadelphia*, 150 Pa. St. 589; 30 Am. St. Rep. 837, on the liability of cities for changing the grade of streets: *Davis v. Missouri Pac. Ry. Co.*, 119 Mo. 180; 41 Am. St. Rep. 648. If a statute gives a remedy in the affirmative, without containing any express or implied negative for a matter which was actionable at the common law, this does not take away the common-law remedy. The statutory remedy is merely concurrent: *Hickman v. City of Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684, and note. A statutory remedy cannot be made exclusive by the legislature as against a party who has a right to redress under the constitution of the state, unless such statutory remedy is commensurate with the

constitutional right, and the remedies to which, by force of the constitution, he was entitled for his protection: *Hickman v. City of Kansas*, 120 Mo. 110; 41 Am. St. Rep. 684. If the property of an abutting lotowner is injured in its market value by the city in grading a street the measure of damages is the diminution in value of the entire realty, and is not limited to the injury to the improvements alone: See monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 845, 850, where the subject is thoroughly discussed: *Columbus etc. Coke Co. v. Columbus*, 50 Ohio St. 65; 40 Am. St. Rep. 648, and note.

**APPEAL—INSTRUCTIONS.**—Instructions should be considered as a whole, and will be upheld if they assert the law correctly, though some particular instruction may be faulty: *Alabama etc. R. R. Co. v. Hill*, 93 Ala. 514; 30 Am. St. Rep. 65; *State v. Levell*, 34 S. C. 120; 27 Am. St. Rep. 799; *Shively v. Cedar Rapids etc. Ry. Co.*, 74 Iowa, 169; 7 Am. St. Rep. 471, and note.

## ST. JAMES MILITARY ACADEMY v. GAISER.

[125 MISSOURI, 517.]

**A CORPORATION MAY SUE FOR A LIBEL OR SLANDER** against it in the way of its business or trade.

**LIBEL—INJURY TO TRADE OR BUSINESS.**—Words falsely published of a party in connection with his business, trade, or profession are actionable *per se* without proof of special damages.

**LIBEL—INJURY TO BUSINESS—TEACHING DANCING.**—If an institution of learning and education is in a flourishing condition, and is in good repute, and well esteemed by its patrons and good citizens, though it permits occasional dancing in its school-building, a false publication charging it with conducting and maintaining an "immoral school," a "dancing school," harmful "to the moral and religious interests of the community," and calling upon friends of religion and good morals to absent themselves from it, is actionable *per se*.

**LIBEL—JUSTIFICATION IS A QUESTION FOR THE JURY.**—Whether a publication charging an institution of learning and education with conducting and maintaining a "dancing school" is justifiable on the ground that dancing is immoral is a question for the jury under a constitutional provision making them judges of the law as well as of the facts in libel suits.

**LIBEL—CONSTRUCTION OF LANGUAGE.**—In construing a publication alleged to be libelous the whole article is to be read and considered together, and such construction put upon the language used as would naturally be given to it.

**MALICE IS IMPLIED FROM A LIBELOUS PUBLICATION.**

**LIBEL—JURY AS JUDGES OF LAW AND FACT—PLEADINGS.**—A constitutional provision making the jury judges of the law as well as of the facts in a libel suit does not relieve the court of the duty of passing upon the pleadings in the case.

*Silver & Brown and C. P. Hess*, for the appellant.

*Dysart & Mitchell*, for the respondents.



528 BURGESS, J. This is an action for libel by plaintiff, a corporation and institution of learning and education, against the defendants. The charge in the petition is that plaintiff permitted dancing in its school-building at receptions given occasionally in each year, and permitted its students to employ, of their own accord and at their own expense, a teacher to instruct them in the art of dancing, and that defendants published of, and concerning, plaintiff and its said school and academy a certain false, malicious, and defamatory libel, charging plaintiff with conducting and maintaining an "immoral school," a "dancing school," "harmful to the moral and religious interests of the community," "hurtful to the moral and spiritual well-being of the community," and calling upon friends of religion and good morals to absent themselves from plaintiff's school and gatherings at its academy.

The defendants, who were resident clergymen of the city of Macon, published the following:

"At the meeting of the Ministers' Alliance of Macon, Missouri, on January 25, 1893, the following paper was unanimously adopted:

"Whereas, The St. James Military Academy of this city, a school formerly under the control of the Episcopal Church, at the beginning of this school year, announced itself as a 'Non-Sectarian Christian Institution,' and, under the present administration, there is fostered a practice, viz., dancing, which is antagonistic to the teaching of our churches and homes, the superintendent and others connected with the institution using their influence to draw the young people of our churches and homes into the practice, which we believe 528 and teach to be hurtful to the moral and spiritual well-being of all engaging in it; and,

"Whereas, we have respectfully requested, first, the superintendent of the school, and, second, the board of curators, that the aforesaid practice be discontinued, so as to enable us to lend our influence toward the building up of an institution of learning worthy of the patronage of all our people; our request having been ignored, and it being the apparent purpose of those in control of the institution to continue such objectionable practice, as evidenced by the opening of a dancing school in the academy building;

"Therefore, be it resolved: 1. That we regard the institution under such administration as harmful to the moral and reli-

gious interests of our community, and on this ground we hereby withdraw any influence or commendation we have heretofore given it; 2. That we urge upon the members of our churches and all friends of religion and good morals that they absent themselves from, and discourage and discountenance in every way, all receptions and other gatherings at the academy as long as dancing is allowed in the building; 3. That a copy of these resolutions be given to each of our city papers, with a request for its publication, and, also, that a copy be sent each of our church papers in this state with the same request.

"J. M. GAISER,

"Pastor of the Cumberland Presbyterian Church.

"W. F. McMURRAY,

"Pastor of the M. E. Church, South.

"T. J. ENYEART,

"Pastor of the M. E. Church.

"W. H. BARNES,

"Pastor of the First Baptist Church.

"DUNCAN BROWN,

"Pastor of the First Presbyterian Church."

§24 The foregoing matter is, with proper innuendoes, charged in the petition to be false and malicious. The defendants answered, admitting the publication complained of and pleading its truth.

Defendants further set up specially, in substance, that plaintiff had hired and procured a dancing master and gave instructions in that art in its school; that when plaintiff's school was opened defendants' good will and co-operation in its purpose was invited by plaintiff and the same were given by defendants; that the latter, and the Christian denominations to which they belong, are conscientiously opposed to dancing; that defendants requested plaintiff to discontinue the objectionable feature of dancing at its school, which plaintiff refused to do; that the publication complained of was not false nor libelous, but was made by defendants in the conscientious discharge of a duty which they had the legal and moral right to perform.

The defendants further state that the publication was not made concerning plaintiff, but of another institution which had succeeded plaintiff in the management of the school.

The plaintiff first moved to strike out all of the foregoing special defense, except that part contained in the last para-

graph, *supra*. This motion the court overruled and plaintiff duly excepted. Plaintiff filed a reply in the form of a general denial, and, the cause coming on for trial before a jury, defendants objected to the introduction of any evidence by plaintiff and the court sustained the objection. Plaintiff then took a nonsuit with leave to set the same aside. The motion to set aside the nonsuit and to grant a new trial was duly made and overruled, and plaintiff excepted. Plaintiff thereupon perfected its appeal to this court.

The questions presented for review arise: 1. On the action of the court in refusing to sustain plaintiff's <sup>525</sup> motion to strike out part of the answer; and 2. On the refusal of the trial court to permit plaintiff to introduce any evidence in support of its petition. No special damages were alleged, nor was it alleged that patrons of the academy had withdrawn their support, or that any person had since refused to patronize it on account of the publication.

The right of a corporation to sue for libel or slander against it, in the way of its business or trade, is not questioned. That such a suit might be maintained was held by this court in *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539; 27 Am. Rep. 293: See, also, *Newell on Defamation, Slander, and Libel*, 360.

The question then is, whether the words complained of are actionable *per se* as containing a defamatory imputation upon the plaintiff, or, rather, whether or not there was enough in them to warrant the court in submitting them to the jury. In the publication there is no statement or insinuation that the dancing, permitted or practiced at the academy, was of an improper character.

Words which on the face of them when falsely published of a party in connection with his trade or profession, which must necessarily injure him with respect thereto, or which directly tend to the prejudice of such person in his trade or business, are actionable in themselves without proof of special damages: *Newell on Defamation, Slander, and Libel*, sec. 1, p. 168; *Morasse v. Brochu*, 151 Mass. 567; 21 Am. St. Rep. 474; *Price v. Conway*, 134 Pa. St. 340; 19 Am. St. Rep. 704; *Odgers on Libel and Slander*, 2d ed., p. 65, and authorities cited; *Williams v. Davenport*, 42 Minn. 393; 18 Am. St. Rep. 519; *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568; 15 Am. St. Rep. 794; *Sanderson v. Caldwell*, 45 N. Y. 398; 6 Am. Rep. 105; *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874;

*Collins v. Dispatch Publishing Co.*, 152 Pa. St. 187; 34 Am. St. Rep. 636.

Measured by the rule thus announced, were the <sup>526</sup> words published of and concerning plaintiff libelous and actionable *per se*? That they were published of and concerning its business there is no question. It was, at the time of the alleged publication, an institution of learning and education, and prior thereto, as alleged in the petition, in a flourishing condition, in good repute and well thought of by all of its patrons and good citizens, and we cannot perceive how to publish of it, by implication, at least, that it was not worthy of the patronage of the people, and in express terms to say that its administration was harmful to the moral and religious interest of the community, was otherwise than hurtful, being calculated, as it was, to induce the patrons of the school to withdraw their patronage therefrom and to dissuade others not to patronize it who may have been inclined to do so but for the immoral imputations cast against it by defendants. The charges were hurtful both to plaintiff's standing as an educational institution and in a financial point of view; for some persons, even though not opposed to dancing, might be found who would hesitate to patronize such an institution of learning where dancing was permitted if, by reason thereof, they might be criticised for patronizing an immoral institution.

In *Cooper v. Greeley*, 1 Denio, 358, the rule is thus announced by Jewett, J: "It is the duty of the court in an action for a libel to understand the publication in the same manner as others would naturally do. 'The construction which it behooves a court of justice to put on a publication which is alleged to be libelous is to be derived as well from the expressions used as from the whole scope and apparent object of the writer.'"

We understand the principle to be in that case correctly announced, to wit, the scope and object of the whole article is to be read and considered together, <sup>527</sup> and such construction put upon the language used as would naturally be given to it, and when this is done it seems to us that the article, taken as a whole, is susceptible of no other fair construction than as containing an imputation upon plaintiff's morality, in respect to permitting dancing in its academy, and that its tendency was to injure plaintiff in its standing as an institution of learning and education.

Whether the publication complained of when taken and read altogether was justifiable upon the ground that dancing is immoral is a question to be passed upon by a jury, who, under our constitution, are the judges of the law as well as of the fact in cases of this character. From a libelous publication malice is implied: *Byam v. Collins*, 111 N. Y. 143; 7 Am. St. Rep. 726; *Bradstreet Co. v. Gill*, 72 Tex. 115; 13 Am. St. Rep. 768; *Ramsey v. Cheek*, 109 N. C. 270; *Mitchell v. Bradstreet Co.*, 116 Mo. 226; 38 Am. St. Rep. 592.

It is also contended by plaintiff that as section 14, article 2, of the state constitution, provides, "that, in all suits and prosecutions for libel, the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact," whether or not the dancing was immoral was a question to be determined upon proper proof by the triers of fact. While it is true that in case of a prosecution for libel the jury are the judges of both the law and the fact: *Arnold v. Jewett*, 125 Mo. 241. It has never been understood that it was their duty or their province to pass upon the pleadings in the cause. In *McGinnis v. Knapp*, 109 Mo. 131, a demurrer to the petition was sustained by the court below upon the ground that it did not state a good cause of action, and upon appeal the judgment of the court was reversed, but nowhere is it intimated in the opinion of this court that the case ought to have gone to the jury upon the question as to whether or not the petition stated a good cause of <sup>528</sup> action. If this contention is correct, the judge of the court is but a mere figurehead, a useless and unnecessary ornament, in the trial of such cases. We are unable to give our assent to this contention.

Our conclusion is that the court did not err in overruling plaintiff's motion to strike out that part of defendant's answer which set up a special defense, but that it committed error in sustaining defendant's objection to the introduction of any testimony under the petition which stated a good cause of action. The judgment is reversed and the cause remanded.

All of this division concur.

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**LIBEL.**—A corporation may maintain an action for libel for words published of it in the way of its trade or business: *Trenton etc. Ins. Co. v. Perrine*, 3 Zab. 402; 57 Am. Dec. 400; *Hahnemannian Life Ins. Co. v. Beebe*, 48 Ill. 87; 95 Am. Dec. 519. Published words are actionable which directly tend to the prejudice or injury of any one in his office, profession, trade, or business, and which, if true, would render him unworthy of employment: *Williams*

v. *Davenport*, 18 Am. St. Rep. 519, and note; *Mitchell v. Bradstreet Co.*, 116 Mo. 226; 38 Am. St. Rep. 592, and note; *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 874. If an article is ambiguous its significance is for the jury to determine, otherwise it is for the court: *Hayes v. Press Co.*, 127 Pa. St. 642; 14 Am. St. Rep. 878, and note. A newspaper proprietor is liable for what he publishes in the same manner as any other individual: *Upton v. Hume*, 24 Or. 420; 41 Am. St. Rep. 863. From a libelous publication the law implies malice, and infers damage if the publication is false, except in the case of privileged communications: *Upton v. Hume*, 24 Or. 420; 41 Am. St. Rep. 863, and note. A constitutional provision making the jury judges of the law as well as of fact in libel suits does not prevent the court from deciding all questions of law as to matters preliminary to the final submission of the cause to the jury: See monographic note to *State v. Whitmore*, 42 Am. St. Rep. 291, on the jury as judges of law and fact.

## SELL v. WEST.

[126 MISSOURI, 621.]

**A RESULTING TRUST CANNOT ARISE** if the transactions on which the supposed trust is bottomed appear to have had their origin in any fraudulent purpose.

**RESULTING TRUST—LIMITATION OF ACTION.**—If a father vests title to land in his son by transactions intended by the former to defraud his creditors, no resulting trust arises in favor of the other heirs, upon the father's death, though the claims of such creditors are barred by the statute of limitations.

**TRUSTS.**—The relation of trustee and *cestui que trust* must arise out of facts as they exist at the time of the original transaction. It cannot be created by subsequent and independent circumstances.

**EQUITY—RULE AND PRECEDENTS.**—A court of equity must be guided by established rules and precedents. It has no more right than has a court of law to act upon crude notions of what is right in a particular case.

*Charles E. Pearce*, for the appellants.

*Fisse & Allen*, for the respondents.

625 **SHERWOOD, J.** The parties plaintiff and defendant to this proceeding are (with the exception of defendant Franklin P. Steer, lessee, and plaintiff Walter E. Sell, and defendant Lewis Ruffner, Jr.) the three children of Thomas H. West, to wit, Washington West, Martha E. Sell, and Virginia L. Ruffner. Thomas H. West died some time in the summer or fall of the year 1878.

In the year 1862 Thomas H. West, then doing business in St. Louis, became hopelessly involved and bankrupt. He then owned certain property on the north side of Olive street, between Fifth and Sixth streets, and a tract of land out

at Shaw's Garden, which properties were sold under foreclosure of a mortgage made by Thomas H. West to Frederick L. Billon and bought in by Billon, the mortgagee. Shortly after this sale, to wit, in July, 1862, Ruffner, the son in law of West, made an arrangement with Billon, whereby the latter agreed to convey to Ruffner the property thus bought, whenever the purchaser, Billon, should have repaid himself out of the rents and profits of the property—the indebtedness of Thomas H. West to him. This arrangement was consummated in 1867 by <sup>626</sup> deed to Ruffner. Subsequent to the agreement, and possibly subsequent to the consummation of that agreement, the same property was sold under certain judgments recovered against Thomas H. West, and Ruffner became the purchaser and received deeds therefor, the purchase money being furnished by Thomas H. West.

In 1878 Ruffner, becoming involved in financial difficulties, and in order to prevent these properties from being sold to pay his indebtedness, conveyed them to his brother in law, defendant Washington West, for an express consideration of twenty-five thousand dollars, none of which was paid nor intended to be paid. Defendant Washington West has had twenty-five feet of the fifty-two and one-half feet of the Olive street property conveyed to Mead as trustee of Virginia L. Ruffner, and has had the Shaw place conveyed to Martha E. Sell. Said defendant yet holds the residue of the property on Olive street, and has acquired property and built a residence of considerable value on Estelle street, which acquired property, it is alleged (and this is probably for the most part true), was acquired with the rents derived from the other heretofore-mentioned property.

This proceeding instituted in March, 1888, had for its object the obtaining of a decree declaring that defendant Washington West holds the title to the residue of the property on Olive street, and the property on Estelle street, as a trustee of a resulting trust in favor of the beneficial plaintiff Martha E. Sell and of the other heirs of Thomas H. West. An accounting is also asked for concerning the rents and profits from the date of the death of Thomas H. West and for partition and for other and further relief.

The answer of defendant West, among other things, stated, that all of the transactions set forth in plaintiff's petition, whereby the title to the property in <sup>627</sup> question became transferred from Thomas H. West to defendant Ruffner, and

thereafter to defendant West, were wholly fraudulent and illegal and intended to defraud the creditors, first, of Thomas H. West, and, next, of defendant Ruffner. By this answer it was shown that, at the date of the transactions out of which the petition alleged a resulting trust to arise, Thomas H. West was hopelessly insolvent, that many judgments had been recovered against him, all of which judgments were at the date of these transactions entirely unsatisfied, and all of which remained unsatisfied at the time of the institution of this suit.

It further appeared in evidence at the hearing that the partition of the property actually made by the defendant after the death of his father was so made in pursuance of the understanding and agreement of all of the parties entitled to claim as heirs of Thomas H. West that the property should be divided precisely as was done. Lewis Ruffner in his deposition, given in behalf of the plaintiff, particularly claims that he held the title upon the express trust and understanding that at the death of Thomas H. West he should convey to the plaintiff the Shaw place property, should convey one-half of the Olive street property to Mrs. Ruffner, and should convey the other half of the Olive street property to the defendant, and that the reason for this apportionment of the property was that thereby the three children of Thomas H. West would receive equal treatment, taking into consideration advancements to the plaintiff and her husband by Thomas H. West made previously to the time when he himself became involved in difficulties. About the facts in the case the record shows no dispute. It is practically conceded on all hands, that the object of the transactions alleged in the petition to have created a resulting trust was to conceal the property of Thomas H. West from the <sup>625</sup> creditors who had obtained judgments against him and to defraud these creditors of their claims.

The defendants, the Ruffners, entered an appearance, but, it seems, filed no answer. After hearing the evidence the lower court dismissed the petition, hence this appeal.

No one can read the record within without being abundantly satisfied that Thomas H. West had the property transferred, as already indicated, to defeat the claims of his creditors, and place his property beyond the reach of process. Indeed, it is patent of record that the title became vested in defendant West as the result of two separate acts of fraud



the first being designed to defraud the creditors of Thomas H. West; the second to defraud the creditors of Ruffner, as well as to continue to hide the property of Thomas H. West from the claims and judgments of creditors.

It is the well settled law of this state, and in most other jurisdictions, that a resulting trust cannot arise or spring into being when the transactions on which the supposed trust is bottomed appear to have had their origin in any fraudulent purpose. For instance, in an early case in this state where the principle just announced came under discussion, this court said: "The purpose really aimed at . . . in this case was probably to show a resulting trust in the grantor, and thereby defeat the action entirely. This is a privilege which strangers, whose interests are affected by the deed, are allowed, but, between parties and privies, such testimony is inadmissible. Parties and privies are not permitted to allege their own fraud as ground for varying or avoiding a deed: *Belden v. Seymour*, 8 Conn. 312; 21 Am. Dec. 661.

"It will be readily observed, that the principle upon which this case turns cannot be affected by the accidental circumstance, that the grantee is one of <sup>the</sup> the heirs of the grantor, and by means of the fraud gets advantage over his co-heirs, which neither the law of distribution nor the grantor's will designed. The grantor and his son, the grantee, were both participators in the fraud, and its object was to enable the grantor to defraud the government of the United States. The party defrauded has not complained, and is not attempting to set aside the deed. There is no pretense that the deed is otherwise than it was intended to be, but merely that the grantee is unwilling to comply with a secret understanding which existed between the parties, and which is totally inconsistent with the face of the deed. In such a case there is, manifestly, no hardship in holding the grantor to his deed, and if, as in this case, this hardship descends to his children or heirs, it results from a principle of law, too well settled and too necessary to be maintained in other cases, to authorize us to disturb it here": *Henderson v. Henderson*, 13 Mo. 151.

In a still earlier case in this state this court held: "A father having, for a fraudulent purpose, conveyed lands for the benefit of two of his children his heirs cannot in equity set aside such conveyance on the ground of fraud. No man is entitled to the aid of a court of equity when that aid be-

comes necessary by his own fault. The complainants coming in as heirs of their parents, being mere volunteers, cannot claim any greater advantage than their ancestors": *Ober v. Howard*, 11 Mo. 425.

In *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203, a father, in order to place his land beyond the reach of his creditors, conveyed it to his daughter. After his death his administrator, alleging that this conveyance was made to defraud creditors of their just demands, obtained an order of the county court to sell the same. When the land was sold the administrator bought it, and, <sup>630</sup> receiving a deed therefor, filed his bill against the daughter, alleging the facts aforesaid, and praying that the conveyance be set aside. On demurrer the bill was held insufficient, this court observing: "The conveyance of Williamson, however fraudulent against his creditors, was valid against him and his heirs. At his death the land constituted no part of his estate, nor could the administrator, who represented his interests, undertake to set it aside."

This court said on the same subject, in *Miller v. Davis*, 50 Mo. 572: "It is a well-settled principle of equity jurisprudence, that, in general, where one person pays the purchase money for land, and the title is conveyed to another, a trust results in favor of the party who paid for the land. But, where such purchase is made in fraud of an existing statute and in evasion of its express provisions, no trust can result in favor of the party who is guilty of fraud": See, also, *Higgins v. Higgins*, 55 Mo. 348; *Buren v. Buren*, 79 Mo. 538; *Larimore v. Tyler*, 88 Mo. 661, and cases cited.

A learned author states the general rule governing this subject very comprehensively by saying: "If a voluntary conveyance is made for some illegal or fraudulent purpose, whether it is a common law or a modern conveyance, no trust will result to the grantor; as, if the voluntary conveyance is made to hinder, delay, and defeat creditors, or to give a man a colorable qualification to vote, or to sit in Parliament, or to kill game, or to disqualify the grantor for an office, or to commit any other fraud; for the reason that the rules of law cannot be used, controlled, or avoided by parties with a fraudulent intent to do that indirectly which they cannot do directly": 1 Perry on Trusts, 4th ed., sec. 165.

And this case is not altered, nor in manner affected, <sup>631</sup> by the fact that the statute of limitations has run against

judgments obtained against Thomas H. West in his lifetime. The existence of this statutory bar did not have, and could not have, the effect of purging the original transactions of the fraud wherewith they were contaminated.

The relation of trustee and *cestui que trust* must arise at time of the original transaction and be contemporaneous therewith, and cannot be brought forth by subsequent and independent circumstances: *Kelly v. Johnson*, 28 Mo. 249. So that we might readily concede the presumption exists that the judgments have been paid, and still this concession would not remove the taint from the occurrences on which the beneficial plaintiff relies to establish a resulting trust.

In closing this opinion it is well enough to advert, for a moment, to the singular claim made by plaintiff's counsel: "That no court of equity is bound to limit itself to any rules, however venerable, in the consideration of any case brought into its forum. The only question which a court of equity is bound to solve is the question as to what is right, and what should the parties do in good conscience." In reference to this, it may be said that a court of equity has no more right to steer its course by crude notions of what is right in a particular case than has a court of law: 1 Pomeroy's Equity Jurisprudence, sec. 47.

Holding these views we affirm the decree of dismissal.

All concur.

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**EQUITY—TRUSTS—RESULTING TRUSTS—FRAUDULENT CONVEYANCES.**—Equity follows the law, and, where there is no legal liability, equity can create none: *Henderson v. Overton*, 2 Yerg. 394; 24 Am. Dec. 492. A resulting trust cannot arise out of fraudulent transactions, as where conveyances are made to defraud creditors: *Jackson v. Miller*, 6 Wend. 228; 21 Am. Dec. 316; *Dudley v. Bosworth*, 10 Humph. 9; 51 Am. Dec. 690; monographic note to *Neill v. Keese*, 51 Am. Dec. 754; *Farmers' etc. Bank v. Kimball Milling Co.*, 1 S. Dak. 388; 36 Am. St. Rep. 739. A resulting trust must arise at the time of the execution of the conveyance: *Beecher v. Wilson*, 84 Ala. 813; 10 Am. St. Rep. 883; monographic note to *Neill v. Keese*, 51 Am. Dec. 755, on resulting trusts. A conveyance to defraud creditors is valid between the parties to it and their representatives: See monographic note to *Whitworth v. Thomas*, 3 Am. St. Rep. 727, on recriminatory fraud; *Gilbert v. Stockman*, 81 Wis. 602; 29 Am. St. Rep. 922; *Springfield Homestead Assn. v. Roll*, 137 Ill. 205; 31 Am. St. Rep. 358, and note. And such a conveyance is equally binding upon the grantor, his heirs, privies, assigns, and those claiming under him: Note to *Whitworth v. Thomas*, 3 Am. St. Rep. 729; but, in all cases where a fraudulent conveyance is valid and enforceable between or against the original parties, it is also valid and enforceable against their heirs: Note to *Carll v. Emery*, 12 Am. St. Rep. 518.

# JONES v. ST. LOUIS SOUTHWESTERN RAILWAY CO.

[125 MISSOURI, 602.]

**RAILROAD COMPANIES—PORTER OF PULLMAN PALACE-CAR IS NOT A FELLOW-SERVANT BUT PASSENGER, WHEN.**—A Pullman palace-car being a part of a railway train, its porter, who, by his contract with the palace-car company and the contract between it and the railroad company, is subject to the rules and regulations of the latter is not a fellow-servant of those operating the engine and railway train while merely riding in the latter and attending to his duties. So far as the careful running and management of the train are concerned he is merely a passenger.

**CARRIERS—STIPULATION AGAINST NEGLIGENCE.**—A carrier of passengers cannot, by contract, stipulate against liability for its own negligence.

**NEGLECT—DAMAGES—EXCESSIVE VERDICT.**—In an action by the porter of a Pullman palace-car against a railway company for personal injuries on account of the latter's negligence a judgment for three thousand dollars for the loss of one eye and the serious impairment of the other, with the attendant pain, loss of time, and expense incurred, is not excessive.

*Sam H. West and Lyne S. Metcalfe, Jr., for the appellant.*

*Virgil Rule and Charles P. Johnson, for the respondent.*

671 **MACFARLANE, J.** Action for personal injury on account of negligence. I adopt, in substance, the very fair and succinct statement of counsel for appellant.

"Plaintiff, at the time of the injury complained of, was in the general employment of the Pullman's Palace-car Company as a car porter, by virtue of a contract between him and the said company, by which, among other things, it was stipulated that, in consideration of said employment, he undertook and bound himself 'to obey all rules and regulations of the transportation companies made for the government of their own employees over whose lines the said Pullman's Palace-car Company may operate while I am traveling over said lines in the employment and service of said Pullman's Palace-car Company; and, in consideration of said employment and wages, I hereby, for myself, my heirs, executors, administrators, or legal representatives, forever release, acquit, and discharge any and all such transportation companies from all 672 claims for liability of any nature or character whatsoever on account of any personal injury or death to me while traveling over such lines in said employment.' There was also in force at the time of the injury to plaintiff a contract between the Pullman's Palace-car Company and the defendant, by the terms of which the Pullman company agreed to furnish sleeping and parlor cars to be used by the railway

company for the transportation of passengers, said cars to be satisfactory to and accepted by the railway company. The Pullman company also agreed to furnish, at its own cost, one or more employees upon each of its cars, whose duty it should be to collect fares for the accommodations furnished in said cars, 'and generally to wait upon passengers therein and provide for their comfort.' It was also agreed between the Pullman company and defendant that the 'said employees of the Pullman company shall be governed by and be subject to the rules and regulations of the railway company which are or may be adopted, from time to time, for the government of its own employees.'

"On May 20, 1892, the defendant was engaged in operating its road in the state of Arkansas, and plaintiff was acting as porter of a Pullman car, which was one of a train of passenger-cars then operated on defendant's railway in Arkansas. His duty was, at that time, to look after the comfort and safety of such of defendant's passengers as were traveling upon the Pullman car. On said date a collision occurred near the station of Humphreys, Arkansas, on defendant's railway, caused by the negligence of the conductor and engineer of the train upon one of the cars of which plaintiff was then acting as porter. The negligence of the conductor and engineer consisted in their failure to obey the orders given them by defendant's agent, await and pass at that station a train on defendant's <sup>672</sup> road coming from the opposite direction, which negligence resulted in a collision of said trains, whereby plaintiff, while engaged in his duties as porter, was injured. The referee finds that this injury was to one of his eyes, and was caused by pieces of glass, broken from a window in his car, striking his eye. The injury resulted in a total loss of one eye, and the use of the other was more or less impaired, although the referee does not find that the use of the other eye will be permanently impaired. Plaintiff has been in the hands of competent physicians while being treated for his injury, and has incurred an expense therefor of one hundred dollars. The referee awards him three thousand dollars as compensation, and judgment was given for that amount." Defendant appealed.

1. The first inquiry is whether plaintiff had such relation to the offending conductor and engineer as made him a coservant with them, within the rule which would exempt the defendant, as the common master, from liability. That

plaintiff was, at the time of his injury, under the general employment of the Pullman company, and that his services were paid for by it, is not disputed. Under the general rule these facts, without qualifications, would make him the servant of that company. If he was also a servant of defendant he was so by virtue of the contract between his general employer and the defendant, which was acquiesced in by himself.

It is true, as the authorities cited by counsel for appellant clearly demonstrate, that the relation of master and servant may exist, though the latter is neither employed nor paid by the former. Thus, it is said: "The general servant of A may, for a time, or on a particular occasion, be the servant of B, and a person who is not under any paid contract of service may nevertheless have put himself under the <sup>674</sup> control of an employer to act in the capacity of servant: *Johnson v. Lindsay*, L. R. App. Cas. (1891), 371; *Mound City etc. Co. v. Conlon*, 92 Mo. 221.

This principle has been applied in cases in which the general master has, with the consent of his servants, hired them to another, giving the latter complete control and direction of them: *Rourke v. White Moss Colliery Co.*, 1 Com. P. Div. 556; *Morgan v. Smith*, 159 Mass. 570; *Brown v. Smith*, 86 Ga. 274; 22 Am. St. Rep. 456; *Wyllie v. Palmer*, 137 N. Y. 248.

There can be no doubt, under the agreement between the defendant and the Pullman company, that the principal duties of plaintiff pertained to the business of his general employer, the Pullman company. As to all such duties he was subject to its exclusive control and direction. The duties of the respective servants of the two companies were common only in respect to providing for the safety and comfort of the passengers of the defendant, or such of them as sought the special accommodation afforded by the Pullman car company. As to these matters the employees of that company in charge of its cars were in law the servants of defendant. "Their negligence, or the negligence of either of them, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company": *Pennsylvania Co. v. Roy*, 102 U. S. 457; *Railroad Co. v. Walrath*, 38 Ohio St. 461; 43 Am. Rep. 433; *Thorpe v. New York etc. R. R. Co.*, 76 N. Y. 402; 32 Am. Rep. 325; *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 122; 17 Am. St. Rep. 611; *Louisville etc. R. R. Co. v. Katzenberger*, 16

Lea, 380; 57 Am. Rep. 232; 8 Wood on Railroads (1894), p. 1701.

In these cases it was held that the employees in charge of Pullman cars are to be treated as the servants of the transportation company in all matters pertaining to the safety and security of the passenger, and such company will be liable for all damage to passengers <sup>675</sup> resulting from their negligence or misconduct. The relation of master and servant, and the liability of the master, is placed upon the law applicable to common carriers, though in direct contravention of contracts between the two companies. The law will not permit a carrier to evade its duties by means of a contract with a third party.

We do not think the relationship of master and servant, thus created by law and independent of contract, would necessarily constitute the servants of the two companies fellow-servants within the rule *respondeat superior*, most certainly not, in respect of duties which were not common. The injury resulted from the negligent management of the train. There was nothing, either in the agreement of plaintiff or in the contract between the defendant and the Pullman company, which required him to assist in running and managing the train, nor did his duties to the Pullman company require it of him. Plaintiff and the negligent servants of defendant did not have a common employer, and the duties, a neglect of which caused the damage, were not common, and under neither the general rule nor any exception to it can they be regarded as fellow-servants, in the sense of relieving defendant of liability. Plaintiff can only be regarded as the servant of the Pullman company, except in the performance of such duties as defendant had the right to direct and control, or of such as pertained to the safety and security of passengers. While merely riding in the Pullman car, and looking after the welfare of the passengers therein, he was in no sense a fellow-servant of those operating the engine and train. There was neither a common employer, a common director, nor a common service.

2. Plaintiff was transported over defendant's road under a contract, which was supported by a sufficient consideration, and he was entitled to the rights of <sup>676</sup> a passenger in respect of the careful running and management of the train. The rights of plaintiff and the obligations of defendant to him, under this contract, do not differ materially in these respects

from those which are implied under contracts between a transportation company and the government, by which the former agrees to carry the agents which have charge of the mails; or, under contracts with express companies to transport their agents who are in charge of their business, or with shippers of livestock to carry the persons in charge of the stock. Under these contracts the persons carried are uniformly held to be entitled to the protection of passengers: *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 460; *Graham v. Pacific Ry. Co.*, 66 Mo. 536; *Tibby v. Missouri Pac. Ry. Co.*, 82 Mo. 300; *Carroll v. Missouri Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382; *Hutchinson on Carriers*, 2d ed., secs. 564, 565; *Kenney v. New York Cent. etc. R. R. Co.*, 125 N. Y. 422.

The agreement of the Pullman company with defendant, that its "employees should be governed by, and subject to, the rules and regulations" of defendant, does not affect the principle involved, for the reason, if for no other, that the injury to plaintiff was not the result of the violation by him of any prescribed rules.

3. It is settled law in this state that a carrier cannot, by contract, stipulate against its own negligence. It is said: "This rule, in its application to the carriage of passengers, has never been relaxed": *Tibby v. Missouri Pac. Ry. Co.*, 82 Mo. 301, and cases cited; *Carroll v. Missouri Ry. Co.*, 88 Mo. 239; 57 Am. Rep. 382.

4. We cannot say, as a matter of law, that a judgment for three thousand dollars for the total loss of one eye and the impairment of the other, with the necessary pain and suffering, loss of time, and expense incurred, is excessive. Finding no error the judgment is affirmed.

All concur.

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**RAILROAD COMPANIES—NEGLIGENCE—PASSENGERS.—THE PORTER OF A PULLMAN PALACE-CAR** is the servant of the railroad company of whose train such car is a part in all matters pertaining to his duties: *Williams v. Pullman Palace-car Co.*, 40 La. Ann. 417; 8 Am. St. Rep. 538. A railway company which accepts and adopts a sleeping-car belonging to a sleeping-car company as a part of its train is liable for the safe carriage of passengers traveling in such car, and an action for personal injuries may be maintained against the railway company as well as the sleeping-car company; see monographic note to *Pullman Palace-car Co. v. Lowe*, 26 Am. St. Rep. 334, on the obligations and liabilities of sleeping-car companies. A company owning and operating a sleeping-car is still a passenger carrier, and liable as such: *Pullman Palace-car Co. v. Pollock*, 69 Tex. 120; 5 Am. St. Rep. 31, and note. And a passenger, in a legal sense, is one who travels in



some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare, or that which is accepted as an equivalent therefor: *Bricker v. Philadelphia etc. R. R. Co.*, 132 Pa. St. 1; 19 Am. St. Rep. 585.

**A CARRIER CANNOT STIPULATE AGAINST ITS OWN NEGLIGENCE:** See note to *Railroad v. Dies*, 30 Am. St. Rep. 874; *Georgia R. R. etc. Co. v. Keener*, 93 Ga. 808; 44 Am. St. Rep. 197, and note. For the application of the rule with respect to personal injuries, see *Missouri Pac. Ry. Co. v. Ivey*, 71 Tex. 409; 10 Am. St. Rep. 758.

**NEGLECTENCE—DAMAGES—EXCESSIVE VERDICT.**—For illustrations of verdicts in actions against railway companies for personal injuries on account of negligence, which have been held not excessive, see *Virginia Midland Ry. Co. v. White*, 84 Va. 498; 10 Am. St. Rep. 874, and note; *Missouri Pac. Ry. Co. v. Jones*, 16 Am. St. Rep. 879; *Standard Oil Co. v. Tierney*, 92 Ky. 267; 36 Am. St. Rep. 595, and note.

# CASES

IN THE

## COURT OF ERRORS AND APPEALS

OF

### NEW JERSEY.

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#### KALMUS *v.* BALLIN.

[82 New Jersey Equity, 290.]

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PREFERENCES.**—A debtor may lawfully prefer one creditor over another.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—DUTY TO ATTACK.**—The duty to attack prior fraudulent transfers of an assignor's property primarily devolves upon his assignee, who cannot be supplanted in the performance of such duty, unless he will not or cannot properly perform it.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—RIGHT OF CREDITORS TO ATTACK.**—If, after demand from a creditor upon an assignee for the benefit of creditors that the latter attack a transfer made by an assignor, such assignee refuses to make the attack the creditor may then sue in his own name for the purpose of assailing and avoiding such transfer.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—RIGHT OF CREDITOR TO ATTACK.**—A creditor who merely requests an assignee to institute suit to set aside prior transfers made by the assignor as fraudulent, without informing him of facts tending to show fraud and reasonable ground for contest, does not, upon the failure of the assignee to act, thereby establish his neglect or refusal, so as to entitle the creditor to institute suit in his own name.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—DUTY TO ATTACK.**—An assignee is not bound, upon the request of a creditor, to institute suit at his own expense to set aside prior transfers made by his assignor as fraudulent, and his refusal to act, based on lack of funds, is not wrongful unless his excuse is false, or the creditor has offered, in good faith, to supply funds or indemnify him against loss.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—DUTY OF ASSIGNEE TO ATTACK.**—An application by creditors to an assignee for their benefit to institute proceedings to set aside prior transfers by the assignor as fraudulent can only be made by creditors to whom the assignee bears such relation as imposes upon him the duty to make such attack.

**FRAUDULENT CONVEYANCES—RIGHT OF CREDITORS TO ATTACK.**—Creditors acquire a status to challenge a transfer of property by their debtor as fraudulent, only by having first presented their claims to his assignee, or by obtaining a judgment or other lien, which, but for the transfer, would affect the property.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—RIGHT OF ASSIGNEE TO ATTACK.**—An assignee for the benefit of creditors is a trustee and entitled to attack a previous transfer of property, by his assignor in the interest of the creditors, to the extent necessary to satisfy their claims.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS—PRIOR FRAUDULENT TRANSFERS—RIGHT OF CREDITOR TO ATTACK.**—Until a creditor has presented his claim to the assignee he has no right to demand that the latter institute suit to set aside a prior transfer made by the assignor as fraudulent, and, until the claim is so presented, the creditor has no right to institute such suit in his own name on the ground that the assignee has neglected to act upon such demand.

*R. B. Seymour and G. Collins*, for the appellants.

*W. P. Douglass*, for the respondents.

<sup>391</sup> **MAGIE, J.** The bill in this cause was filed by Louis Ballin and others, partners, in behalf of themselves and other creditors of Hannah Morris. It was founded on an attachment sued out by them in the Hudson county circuit against her property. It averred, among other things, that Hannah Morris had, previous to the attachment, made a bill of sale of a stock of goods in her store to Jacob Kalmus, and that he had made three chattel mortgages on the goods—one to Aleck Kantrowitch, one to Leopold J. Liberman, and one to Charles Flauk. It charged that the bill of sale and mortgages were made without consideration and for the purpose of defrauding the creditors of Hannah Morris. The prayer was that they should be set aside and the property be subjected to the lien of the attachment or sold for the benefit of creditors.

The bill further showed that Hannah Morris had subsequently made an assignment for the benefit of creditors, to one Lowy, <sup>392</sup> but he was not made a party. Kalmus and the three mortgagees were made defendants.

Upon the bill with affidavits annexed being filed, an order to show cause was made, returnable December 27, 1892, and a restraining order.

On December 27, 1892, another order was made permitting respondents to amend their bill by striking out all the charges respecting the attachment (which had then been dissolved), and by adding a more particular statement of the assign-

ment for the benefit of creditors; an averment that the assignee had been requested to take proceedings to set aside the bill of sale and mortgages and that he had refused, and an additional prayer for a declaratory decree that the title of the goods passed under the assignment to the assignee. It further permitted respondents to make the assignee a party defendant, and continued the order to show cause to January 3, 1893. It also appointed a receiver of the goods, and directed him to dispose of them in the usual course of business at retail.

The order to show cause was brought to hearing on January 3, 1893, upon the bill and the annexed affidavits and counter-affidavits and exhibits. The order was made absolute and the receiver continued.

On January 12, 1893, upon a report of the receiver that the business was unprofitable and no insurance could be obtained upon the stock of goods, an order was made directing him to sell the stock as a whole.

Kalmus has appealed from the orders of December 27, 1892, and of January 3 and January 12, 1893.

Kantrowitch and the other mortgagees have appealed from the two last-mentioned orders.

All the appeals were argued together.

It is first contended that, if it be assumed that respondents had a status to question the transactions which the bill sought to avoid, the allegations material to the relief prayed for were not so established by the affidavits as to justify the orders seizing the disputed property and disposing of it by the receiver.

293 The propriety of these orders must be determined upon a consideration of the affidavits then before the court below.

A review in detail of the affidavits will serve no useful purpose, and it will be sufficient to indicate the conclusions reached.

In respect to the bill of sale, the charge is that it was without consideration and designed to defraud creditors. As to its consideration, unless the counter-affidavits are rejected as unworthy of credit, for which I can find no reason, it clearly appeared that the transfer to Kalmus was for a consideration of six thousand dollars, which was no less effective because it was partly paid by a release of Hannah Morris from a debt due to him for borrowed money, and by the assumption of the payment of her note which he had indorsed for her accom-

modation, and which was then held by a bank which had discounted it, and partly by his undertaking to assume debts which she owed to Kantrowitch, Liberman, and Flauk for borrowed money, and to pay her note, which Kantrowitch had indorsed for her accommodation, and which was also held by a bank which had discounted it. Nor do the affidavits show any such inadequacy of consideration as to justify an inference of fraud. Nor can there be discovered therefrom any ground for holding that the transfer was made to hinder, delay, or defraud creditors within the prohibition of our statute. If the affidavits justify an inference that Hannah Morris made the transfer with that intent it will not be sufficient to sustain this allegation of the bill. It must also appear that Kalmus participated in the fraudulent intent or knew at the time of facts and circumstances from which such intent was a natural and legal inference: *Tantum v. Green*, 21 N. J. Eq. 364. It is true that the effect of the transfer is to prefer creditors, but, in the absence of the restrictions of bankrupt or insolvent laws, debtors may prefer creditors and the latter may accept preferences without fraud.

In respect to Kalmus, the orders of January 3d and 12th were made without sufficient proof, and should be reversed.

As to the chattel mortgages, appellants' case is still stronger. The affidavits annexed to the bill showed no fact from which any inference that they were without consideration or made to <sup>394</sup> defraud creditors could be drawn. The counter-affidavits establish that they were given by Kalmus to secure his notes made in pursuance of his agreement with Hannah Morris, and substituted for her obligations held by the mortgagees. The consideration of the mortgages was thus established, and there was nothing to justify even a suspicion that the mortgagees conspired to defraud the other creditors of their debtor.

Upon their appeal there should be a reversal of the same orders.

It is next contended that respondents had no status to maintain this action and file the amended bill. This contention is applicable to the orders already considered, but particularly to the order of December 27th, which permitted the amendment.

By such amendment the whole scope and purpose of the bill was altered. From a bill to enforce the lien of an attachment, interfered with by alleged fraudulent transfers, it be-

came a bill by particular creditors to establish the rights of an assignee for the benefit of creditors upon such property as against such transfers.

It was conceded in argument that the duty to attack fraudulent transfers of the assignor's property primarily devolves on the assignee. In general he cannot be supplanted in the performance of that duty unless it is one which, from the circumstances, he cannot properly perform or which he will not perform. If there are no circumstances showing disability or intention not to discharge his duty the proper course is for a creditor to whom he owes the duty to give him notice to perform it. Then, if he refuses or neglects to do so, the creditor may become an actor in a suit for the relief he thinks should be afforded: *Le Gendre v. Goodridge*, 46 N. J. Eq. 419; *Davis v. White*, 49 N. J. Eq. 567; *White v. Davis*, 48 N. J. Eq. 22.

There was nothing in the bill or affidavits to indicate that Lowy, the assignee, was disabled from attacking the transactions which the bill seeks to avoid. All that was before the court to indicate his refusal or neglect to perform a duty in that regard is contained in an affidavit of the solicitor. He testifies that, on a day not specified, he applied to the assignee to take proceedings <sup>205</sup> to have the bill of sale and mortgages set aside as fraudulent, and that the assignee refused to comply with his request, alleging, as an excuse, lack of funds to make such a contest.

This affidavit does not establish neglect or refusal on the part of the assignee. In the first place it does not appear that he knew or was informed of any facts tending to show that the bill of sale and mortgages were fraudulent, or that there was reasonable ground for a contest respecting them. It cannot be said that he neglected a duty of which he is not shown to have been aware. In the next place the assignee was not bound to enter on such a contest at his own expense. He based his refusal on that ground, and such refusal was not wrongful, unless it is made to appear that his excuse was false, or that the creditor who applied to him offered in good faith to supply the necessary funds, or to indemnify him against loss.

It is further contended that an application to an assignee in a case of this sort can only be made by creditors to whom he bears a relation which imposes upon him a duty in respect to them, and that respondents are not such creditors.

This contention is applicable to all the orders, for it in-

volves the right of respondents to intervene in case of his refusing their request, and to maintain such a bill.

The bill does not show that respondents had obtained judgment against Hannah Morris upon their claims, or that they had presented their claims to the assignee under oath or affirmation, as required by section 3 of the Assignment Act: Revision, 37. It was conceded in argument that, when amended, the bill was one filed by general creditors, whose claims had not been ascertained and fixed by judgment, and had not been presented to the assignee, so as to entitle the claimants to share in the assets of the debtor when distributed by the assignee, and it is in the capacity of general creditors that respondents claim the right to compel the assignee to attack the alleged fraudulent transfers, and, upon his refusal, to attack them themselves.

The general rule settled in this state is that creditors only acquire a status to challenge a fraudulent transfer of property by their debtor by having first obtained a judgment or other lien <sup>293</sup> which, but for the transfer, would affect the property. Debts which are made liens by statute confer such status upon the creditor: *Haston v. Castner*, 31 N. J. Eq. 697; *Graham Button Co. v. Spielman*, 50 N. J. Eq. 120, 796. Respondents do not fall within this rule, and their right to maintain this action arises, if it exists at all, from the fact that their debtor has made the assignment for the benefit of creditors.

The right of an assignee for the benefit of creditors to attack a previous fraudulent transfer of property by his assignor was first discussed in this state in the supreme court, and, although the question was not necessarily presented, Mr. Justice Potts indicated his opinion to be that such an assignee could attack such fraudulent transfers, and, because he was trustee for creditors, they could compel him to do so: *Garretson v. Brown*, 26 N. J. L. 425.

The question arose afterward in the court of chancery, and Chancellor Zabriskie held that an assignee could not attack the fraudulent transfers of his assignor, on the ground that the latter could not impeach the fraudulent transactions in which he took part, and was incapable of giving authority to another to do so: *Van Keuren v. McLaughlin*, 21 N. J. Eq. 163. This case was followed by Vice-Chancellor Van Fleet in *Pillsbury v. Kingon*, 31 N. J. Eq. 619.

The last-named case was brought to this court by appeal.

The case was one of a conveyance of lands by a debtor in fraud of creditors—an assignment for the benefit of creditors, under which creditors had presented their claims, and the property in the hands of the assignee was insufficient to pay such claims in full. The bill was filed by the assignee for the purpose of setting aside the fraudulent conveyance. The right of the assignee to attack the fraudulent transfer of property by his assignor was thus in question, and it was settled that he had such right. This was put on the ground that, although the assignee was the grantee of one of the fraud-doers, yet he was to be regarded as the representative of creditors so far as to enable him to institute proceedings to set aside such a conveyance when the property <sup>287</sup> affected thereby is needed to satisfy creditors. The assignment was declared to create, *ipso facto*, a trust for the benefit of creditors. But it was also held that the fraudulent transaction would only be set aside so far as was necessary to satisfy the demands of creditors: *Pillsbury v. Kingon*, 33 N. J. Eq. 287; 36 Am. Rep. 556.

Upon the doctrine thus settled, Lowy, the assignee in the case before us, became a trustee for the benefit of creditors and entitled to attack fraudulent transfers of property in the interest of creditors, and to the extent necessary to satisfy their claims. But obviously he owed a duty in this regard only to the creditors with whom the trust relation was established. He is, no doubt, trustee for all creditors who may, within the prescribed time and in the required mode, present their claims, which thus become, *prima facie*, ascertained and fixed. But until a creditor presents his claim he is a stranger to the assignee, and cannot impose on him the burden of a trust in his favor. When a creditor presents his claim the trust relation with the assignee comes into existence. The assignee owes to such a creditor a duty to attack, on proper request, fraudulent transfers of property necessary to satisfy such claims. Upon the neglect or refusal of the assignee to comply with such a request, such a creditor acquires a status to act in the assignee's stead.

This conclusion is not, as argued, in conflict with previous decisions. In *Hays v. Doane*, 11 N. J. Eq. 84, the bill was filed by a judgment creditor to set aside a fraudulent assignment for the benefit of creditors and fraudulent transactions by the assignees. The creditor had not presented his claim to the assignees. The relief finally granted was confined to



property which the assignees had improperly transferred, and the complainant's right to such relief was sustained, not as a general creditor, but as a creditor who had ascertained and fixed his debt by a judgment which would entitle him to any surplus after creditors who had presented their claims were satisfied.

In *Davis v. White*, 49 N. J. Eq. 567, the bill was also filed by a judgment creditor, and its purpose was to set aside various transfers of property, and also an assignment for the benefit of creditors made by the debtor in fraud of creditors. The defendants demurred to the bill, and thereby admitted the fraudulent character of the transactions. This court, in affirming the decree overruling the demurrer, approved the course which Vice-Chancellor Van Fleet had indicated as proper to be taken, which was, not to set aside the assignment, though admitted to be fraudulent as to the complainant, but this approval was expressly put on the ground that the assignment ought to be preserved for the purpose of administering the equities of all the creditors.

The result is that respondents were not in a relation of trust with the assignee and not entitled to require him to attack the transactions set out in the bill. Respondents had, therefore, no status to attack the transactions.

All the orders must, therefore, be reversed.

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**ASSIGNMENT FOR THE BENEFIT OF CREDITORS—PREFERENCES.**—A debtor in failing circumstances may prefer one creditor to another by giving him adequate security for his debt, to the exclusion of others: *Sabin v. Columbia Fuel Co.*, 25 Or. 15; 42 Am. St. Rep. 756, and note.

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS—SETTING ASIDE FRAUDULENT CONVEYANCE BY ASSIGNOR.**—An assignee for the benefit of creditors may set aside a prior fraudulent transfer by his assignor: *Pillsbury v. Kingston*, 33 N. J. Eq. 287; 36 Am. Rep. 556, and note, with the cases collected. An assignee may attack the validity of a judgment by confession of the assignor: *Nichols v. Kribs*, 10 Wis. 76; 76 Am. Dec. 294. An assignment for the benefit of creditors is not vitiated by a fraudulent conveyance made by the assignor in contemplation of the assignment, or at the time it was made. Such conveyance may be set aside by the assignee or by a creditor: *Moody v. Carroll*, 71 Tex. 143; 10 Am. St. Rep. 734. Under the Minnesota statute relating to assignments for the benefit of creditors an assignee may avoid transfers and chattel mortgages of the assignor which the latter's creditors could avoid: *Merrill v. Bessler*, 37 Minn. 82; 5 Am. St. Rep. 822.

## BULLOCK v. BULLOCK.

[52 NEW JERSEY EQUITY, 561.]

**JUDGMENTS—EXTRATERRITORIAL EFFECT IN REM.**—The courts of one state have no jurisdiction to affect by decree or judgment the status of lands lying within another state.

**JUDGMENTS—EXTRATERRITORIAL EFFECT IN REM.**—The courts of the *situs* of land are not bound by the judgment of a court of another state affecting such land in an action in which the jurisdiction is *in personam* only.

**JUDGMENTS—EXTRATERRITORIAL EFFECT.**—An order of a court of another state, made subsequent to decree of divorce rendered therein, directing and requiring the defendant to execute a mortgage on land in another state to secure the payment of alimony, is not conclusive upon the courts of the latter state and cannot be enforced therein, but may be enforced by the court rendering it, so long as defendant is within its jurisdiction, and, when so enforced, is effective in the *situs rei*.

**JUDGMENTS OF SISTER STATES—EFFECT OF IN OTHER STATES.**—The provisions of the federal constitution requiring full faith and credit to be given in each state to the judicial proceedings of sister states are confined to such judicial determinations as possess the quality of judgments, and do not extend to proceedings in the nature of execution, or to orders merely ancillary to some special form of relief.

*E. Q. Keasbey*, for the appellant.

*J. Buchanan*, for the respondents.

562 **MAGIE, J.** The appellant in this cause was the complainant below. Her bill of complaint stated the following facts, viz., that she had commenced an action in the supreme court of the state of New York, which court had "jurisdiction in the case," against respondent, her former husband, for the purpose of dissolving the marriage previously entered into by them; that respondent was personally served with process and duly appeared in said action; that such proceedings were had thereon that a judgment was rendered in her favor, whereby it was adjudged that said marriage should be dissolved; that respondent should pay to her, as alimony, one hundred dollars on the first day of each month, commencing June 1, 1892, and should execute a mortgage as security for such payments, upon lands in the state of New Jersey, of such form and containing such provisions as the court should subsequently direct and approve; that said court, by a subsequent order, directed respondent to execute, acknowledge, and deliver to appellant a mortgage of a specified form and containing specified provisions, upon lands in this state which were particularly described in the order; that respondent had

failed and refused to execute and deliver the mortgage as directed, and made various mortgages and conveyances of said lands without consideration and with the fraudulent purpose of defeating appellant's rights.

<sup>563</sup> It was charged in the bill that appellant, by virtue of the decree and order of the New York court, acquired an equitable lien on said lands prior to the lien and interest of the mortgagees and grantees of respondent, and an equitable right to a mortgage on said lands in accordance with the decree and order.

Upon these statements and charges the prayers of the bill were for answer and discovery, for a decree setting aside the mortgages and conveyances of respondent, and that he be "decreed, pursuant to the said decree and order of the New York supreme court, to execute and deliver" to her "the mortgage on said premises therein directed to be made and delivered, according to the form therein provided." There was a general prayer for relief.

Respondent moved the court of chancery to dismiss the bill pursuant to the practice established by rule 215 of that court, upon the ground that the bill exhibited no equity entitling appellant to the relief she prayed for. The notice of the motion specifically set forth the grounds of objection.

The motion was heard by Vice-Chancellor Bird, and upon his advice a decree was made dismissing the bill. The opinion of the vice-chancellor is reported in 51 N. J. Eq. 444. From this decree appellant has prosecuted the appeal which is now to be decided.

A motion to dismiss a bill under chancery rule 215 is a substitute for a demurrer. The rule was designed to furnish a speedy mode of bringing to adjudication questions which, before its adoption, could only be raised by demurrer. Obviously, all facts stated in the bill which are relevant and well pleaded must be deemed to be admitted to be true upon such motion as upon a demurrer, of which it is the substitute.

Looking at the bill to discover what facts must have been taken to be true upon the hearing of the motion to dismiss I find difficulty in determining how extensive a jurisdiction is thereby asserted to have inhered in the supreme court of New York. It is expressly stated that the action commenced in that court was for the purpose of dissolving the marriage of the parties, and there is a conjoined statement that the court had <sup>564</sup> jurisdiction of the case. From these state-

ments it was obviously to be assumed that the court in question had jurisdiction to decree a divorce and annul a marriage.

But is it to be inferred—for there is no express averment of it—that the same court possessed jurisdiction to fix the amount and require payment of alimony, and especially to require a defendant to secure the payment of alimony by a charge upon lands lying beyond the territorial jurisdiction of the court? Alimony is, in general, an incident of divorce. It may be justifiable to infer that a court empowered to dissolve the bonds of matrimony would also be clothed with authority to determine on the amount of alimony, and to render judgment therefor. But how, without some further averment, is an inference to be drawn that the same court was authorized to require security for the payment of alimony to be given by the mortgage of lands and of lands beyond its jurisdiction?

If, however, the bill is defective in the respect suggested, the defect was not included in the causes set out in the notice of the motion to dismiss, and no objection upon that ground was made in the court below or here. From this, I think, we must deem it to have been conceded that the bill properly averred the jurisdiction of the supreme court of New York to make the decree and order mentioned in the bill, and copies of which were annexed to and made a part thereof.

The decree, in this respect, ordered respondent to pay to appellant the alimony, from time to time, during her natural life, and to execute and deliver to her a mortgage on his real estate, and particularly that located in the state of New Jersey, to secure such payments. The order simply required respondent to perform the decree by executing, acknowledging, and delivering to appellant a mortgage on particular lands in New Jersey, of a form shown in a schedule annexed to the order. The order and requirement of the court was therefore directed *in personam*, and there was no attempt to adjudicate or enforce an adjudication *in rem*.

It is scarcely necessary to observe that a court of New York could not have been empowered to affect by its decree or judgment <sup>ses</sup> lands lying within another state. For no principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its inci-

dents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty nor the judicial proceedings, decrees, and judgments of its courts can in the least degree affect such land and immovable property: Story's Conflict of Laws, secs. 543, 591. The concession as to the jurisdiction of the supreme court of New York in this case must therefore be deemed to be limited to a jurisdiction to proceed *in personam*, and not to extend to a determination, adjudication, or decree *in rem*.

The jurisdiction thus conceded to the supreme court of New York is exactly analogous to the jurisdiction which, since the decision of *Penn v. Lord Baltimore*, 1 Ves. 444, has been universally recognized as inherent in courts administering equity. This recognized jurisdiction extends to making decrees in cases of equitable cognizance, such as fraud, trust, and specific performance against persons brought into those courts, notwithstanding such decrees incidentally affect lands beyond the court's jurisdiction. But the exercise of this jurisdiction has been supported solely on the ground that it operated *in personam* only, and did not extend to the utterance of decrees *in rem*. In the leading American case Chief Justice Marshall declared that the question was whether the question presented was an unmixed question of title, or a case of fraud, trust, or contract: *Massie v. Watts*, 6 Cranch, 148. If relief cannot be effectively given by the decree *in personam* such courts will not retain the bill: *Morris v. Remington*, Parsons' Equity, 887; *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802. Nor will the power be exerted *in personam* to compel an act affecting lands in another jurisdiction of doubtful legality: *Blount v. Blount*, 1 Hawks, 865. The power of such courts to make effective such decrees is limited to their process operating upon the party, such as sequestration of property within jurisdiction, attachment for contempt, and the like; it will not extend to validating a conveyance of the foreign lands made by its <sup>see</sup> master or commissioner, in default of the performance of the decree by the party: *Watts v. Waddle*, 6 Pet. 390; *Burnley v. Stevenson*, 24 Ohio St. 474; 15 Am. Rep. 621. When, by the process of the court acting upon the party, obedience to the decree is enforced as by the conveyance, it is the conveyance, not the decree, that affects the lands in the foreign jurisdiction: *Davis v. Headley*, 22 N. J. Eq. 115.

The long line of cases illustrating this doctrine and its

limitations is collected in 22 American and English Encyclopædia of Law, 918. Nowhere has the doctrine been more clearly stated than in our own courts: *Wood v. Warner*, 15 N. J. Eq. 81; *Davis v. Headley*, 22 N. J. Eq. 115; *Potter v. Hollister*, 45 N. J. Eq. 508; 46 N. J. Eq. 609; *Lindley v. O'Reilly*, 50 N. J. L. 636; 7 Am. St. Rep. 802.

In my judgment it does not admit of doubt that the jurisdiction of the supreme court of New York, if properly averred in the bill, was a jurisdiction to make a decree as to alimony, and its being secured by mortgage on lands in New Jersey only in *personam*, and to enforce it by any process against respondent which is proper in that state. Nor was the decree which was pronounced by that court capable of any other construction than one which shows it to have been within such conceded jurisdiction.

From these considerations I deem it evident that the theory of this bill that, by virtue of the decree and order of the supreme court of New York, appellant acquired an equitable lien on lands in New Jersey and a right to have such lands disposed in a certain manner cannot be sustained without a disastrous violation of fundamental principles. The decree and order of that court does not pretend to have any such purpose or effect, nor could that court be empowered to make a decree having such an effect.

But it is ingeniously contended in this court that the decree and order of the supreme court of New York imposed upon respondent a personal obligation to do what that decree and order had directed him to do, and that a court of equity in New Jersey ought to compel him to perform that obligation as it would compel him to perform his contract to convey or mortgage <sup>567</sup> lands in its jurisdiction. Moreover it is contended that the provisions of section 1 of article 4 of the constitution of the United States, requiring full faith and credit to be given in each state to the records and judicial proceedings of every other state, impart to this decree and order a conclusive force with respect to the mortgage directed to be given on lands here which compels our courts to enforce it by decrees in conformity therewith.

Doubtless the judgment of the New York court must be accorded in our courts a conclusive effect in certain respects. Thus it has conclusively determined the status of the parties to that action, and that the marital relation previously existing between them has been absolutely dissolved. If, by the

direction to pay alimony, an indebtedness arises from time to time as such payments become due, an action at law would lie thereon and the decree would furnish conclusive evidence of such indebtedness.

But the question, upon the solution of which this case must turn, is whether the courts of New Jersey must give conclusive effect to the decree or judgment of the courts of New York made in a case where they had acquired jurisdiction of the parties but affecting lands situated here, and disposing of the title thereto in whole or in part. If this question is to be answered in the affirmative it seems evident that we accord jurisdiction over lands in New Jersey to the courts of other states, and, as was said by Chancellor Zabriskie, in *Davis v. Headley*, 22 N. J. Eq. 115, "leave to the courts of this state only the ministerial duty of executing their decrees." For the doctrine that jurisdiction respecting lands in a foreign state is not *in rem* but only *in personam* is bereft of all practical force if the decree *in personam* is conclusive and must be enforced by the courts of the *situs*.

If such is the effect which must be given to the judgments and decrees of the courts of a sister state respecting lands situated here it is extraordinary that no trace of the doctrine can be found in text-books or in adjudicated decisions. My researches have not disclosed any support of the doctrine by any text-writer of repute or by any decision in point. The very industrious <sup>568</sup> counsel who maintained this view in argument has produced no authority which, in my judgment, sustains his position.

In *Elizabethtown Savings Institution v. Gerber*, 35 N. J. Eq. 153, the question was as to the effect to be attributed by our courts to an order of a court of New York directing a New Jersey corporation to pay money due from it to one Ahern, in part satisfaction of a judgment which the savings institution had recovered against Ahern in New York. The decision of this court went upon the ground that the New York court had not acquired jurisdiction of the New Jersey corporation, which had been ordered to pay, and that its order was consequently void. What was said by the learned chief justice who wrote the opinion respecting the power of our court of chancery to enforce a right to money under such an order was unnecessary to the decision, but can doubtless be supported, because the New York order was for the payment of money raising an indebtedness, which in that case required

to be enforced in the court of chancery, as the debt which was the subject of the order had then been paid into that court. But the effect of a foreign judgment or decree as to money in another state must differ from the effect of such a judgment and decree as to lands in another state.

*Cheever v. Wilson*, 9 Wall. 108, presents a closer parallel to the case in hand. In that case a divorce court in Indiana made an order that one of the parties to an action for divorce should pay to the other party a certain proportion of the rents to accrue from real estate situated in the District of Columbia, and should execute to him a sufficient power to collect such rents. She executed the power as prescribed, and the question before the court was what interest in the rents passed thereby. Mr. Justice Swayne, delivering the opinion of the court, incidentally said that the order "could have been enforced in the *situs rei* by proper proceedings conducted there for that purpose." But this statement is not supported by the cases cited, and was unnecessary to the decision, as the learned judge immediately pointed out by showing that the party had executed an assignment which vested in the other party the interest in the rents which <sup>she</sup> she had been ordered to convey. The whole question was as to the effect of that assignment.

The contention that such an order requiring lands in New Jersey to be charged as alimony created a personal obligation on respondent is, in my judgment, without force. It is a misuse of terms to call the burden thereby imposed on respondent a personal obligation. At most, the decree and order imposed a duty on him, which duty he owed to the court making them. That court can enforce the duty by its process, but our courts cannot be required to issue such process or to make our decrees operate as process. Moreover, the substantial part of the decree is comprised in the dissolution of the marriage and the direction to pay alimony. The charge of the alimony upon lands is rather in the nature of process to enforce the substantial decretal order for alimony.

The establishment of the contrary doctrine would result in practically depriving a state of that exclusive control over immovable property therein which has always been accorded. For example, by our statutes, contracts respecting lands, to be enforceable, must be entered into and evidenced in a particular mode, but our courts, upon equitable grounds, sometimes enforce contracts that are without the statute. It is the prov-



ince of our legislature to prescribe the rule for such contracts and for our courts to construe the rule so prescribed and to determine when such contracts, whether within or without the statute, may be enforced. It is true that the courts of another state, proceeding in *personam* to enforce a contract for lands in New Jersey, would be bound to determine whether the contract was enforceable under our laws. But they would construe those laws, and, if their decree in *personam* may and must be conclusive in our courts and compel a decree in conformity therewith, it is obvious that the contract will be enforced according to whatever construction the foreign court put upon our laws, and not according to the construction of our own courts. Other examples will occur to any one considering the subject.

For these reasons I shall vote to affirm the decree below.

570 GARRISON, J., concurring. I concur in the result announced by Mr. Justice Magie, but not for the reasons contained in the opinion just read, nor for those stated in the conclusions of the learned equity judge who heard the cause in the court of chancery.

The object of the complainant's bill is to execute, through the medium of our court of chancery, an order made by the supreme court of New York upon the defendant to secure his performance of a decree rendered therein against him by mortgaging his lands in New Jersey. The procedure in this state is justified under that provision of the federal law that gives conclusive force in one state to the records and judicial proceedings of another. The vice of this deduction, in the case before us, is that it assumes that the order made by the New York court to secure the performance by the defendant of its decree against him is a "judgment" of that state within the meaning of the federal constitution and the act of Congress.

The transcendent force given by the federal law to the judicial proceedings of sister states is confined to such judicial determinations as possess the quality of judgment; it does not extend to proceedings in the nature of execution or to orders merely ancillary to some special form of relief.

In cases that proceed to judgment in common-law form this distinction is well marked, but it is liable to be lost sight of in decisions rendered in equity causes, where judgment, in decretal form, is often accompanied by special orders for par-

ticular forms of relief or for the enforcement or securing of the execution of the decree pronounced. The distinction, however, is always a substantial one that must not be overlooked because of the form in which the decretal order may be framed.

That only is judgment that is pronounced between the parties to the action upon the matters submitted to the court for decision. To judgments thus rendered, the federal law accords in every state the same conclusive force possessed in the state where they are rendered. After judgment in a state court, all that follows for the purpose of enabling the successful party to reap the benefits of the determination in his favor is execution or in <sup>571</sup> aid of execution. No interpretation has ever been placed upon the federal constitution giving conclusive effect, or, indeed, any effect at all to the executions of the judgments rendered in sister states or to any order merely in aid thereof. Such orders lack the quality of judgment and must be differentiated from judgments, even though embodied by the same decretal orders that pronounce the judgment of the court. These decretal orders may be defined to be decisions made touching some matter collateral to the issue presented in the record or required to be passed upon in order to carry into execution the judgment of the court. To these determinations ancillary to execution no extraterritorial force is given by the federal law.

That the order in the present case touching the defendant's land in New Jersey is of this nature clearly appears in the case before us. Upon this demurrer it is established that the New York suit was instituted for the sole purpose of dissolving the marriage of the complainant with the defendant. Upon the record thus submitted the supreme court of New York pronounced as its judgment that the marriage should be dissolved, with the incident of alimony to the complainant. Here the sentence of the law upon the record ceases. The order of the court then proceeds in these words: "And it is further adjudged and decreed that the said defendant, within ten days after the entry of this judgment, and service thereof on the attorney for the defendant, execute and deliver unto the plaintiff a mortgage covering the real property owned by the defendant and particularly located in the state of New Jersey, which mortgage shall be of such form and contain such provisions as shall be sufficient and requisite to secure unto the plaintiff the faithful performance of the provisions

of this judgment and decree on the part of the defendant as may be directed and approved by this court."

In my opinion this order was ancillary to execution, and did not possess any element of a judgment upon the issue submitted to the court for decision, which was whether the marriage between the parties should be dissolved. For this reason I think the complainant's bill was properly dismissed.

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MR. JUSTICE VAN STOKLE dissented on the ground that "the New York court having jurisdiction of the person of the husband and also of the subject matter of the suit there, the judgment in that state, as between the parties to that suit, was conclusive of the right of the wife to have the husband execute a mortgage upon the New Jersey lands, although it did not of its own force create a lien upon the lands. As to the title of such lands, it had the effect of an admitted legal contract or obligation by the husband to convey and should be enforced in equity here. . . .

"The decree or judgment in New York has the effect of being not merely *prima facie* evidence, but conclusive proof, of the rights thereby adjudicated, and a refusal to give it the force and effect in this respect which it had in the state in which it was rendered denies a right secured by fundamental law.

"The force and effect of the decree for alimony in New York was not to create a lien upon lands in New Jersey, but to conclusively entitle the wife to have that decree enforced against the husband.

"It being competent for our courts to enforce such a decree made in our own courts by establishing it as a lien on lands we cannot refuse like relief in this case on the extraterritorial judgment: *Huntington v. Attrill*, 146 U. S. 657; *McElmoyle v. Cohen*, 13 Pet. 312; *Cheever v. Wilson*, 9 Wall. 108, 121.

"The judgment in New York must be regarded as conclusively imposing a legal personal obligation or duty upon the husband to mortgage his lands in New Jersey, . . . from which he cannot relieve himself by removing from the jurisdiction in which it was rendered; that obligation follows him into this state."

**JURISDICTION OF THE COURTS OF ONE STATE OVER LANDS IN ANOTHER STATE:** See *Baton v. McOall*, 86 Me. 346; 41 Am. St. Rep. 561, and note; *Allen v. Buchanan*, 97 Ala. 399; 38 Am. St. Rep. 187, and *Sentenis v. Ladew*, 140 N. Y. 463; 37 Am. St. Rep. 569, and especially note.

**A JUDGMENT OF DIVORCE GRANTED IN ANOTHER STATE** against a wife over whom the courts did not have jurisdiction, while it may dissolve the marriage relationship existing between the parties, cannot affect her rights in the property of her husband situated in this state: *Doerr v. Forsythe*, 50 Ohio St. 726; 40 Am. St. Rep. 703, and note, with the cases collected.

**A JUDGMENT OF ONE STATE IN ORDER TO BE CONCLUSIVE IN ANOTHER** must be a decision upon the merits. A judgment upon nonsuit, or upon points of pleading, or the course of proceeding, or an interlocutory order, is conclusive only in that case and as to that point: *Taylor v. Barron*, 30 N. H. 78; 64 Am. Dec. 281, and note; *Brinkley v. Brinkley*, 50 N. Y. 184; 16 Am. Rep. 461.

## KEAN v. UNION WATER COMPANY.

[52 NEW JERSEY EQUITY, 812.]

**EQUITY—JURISDICTION OVER ELECTION OF CORPORATE OFFICERS.**—A court of equity has no jurisdiction in a direct proceeding to determine the validity of an election of directors or officers of a private corporation, or the right to such office. If the question arises incidentally or collaterally in a suit properly brought for another purpose the court may decide it.

*R. V. Lindabury, F. Bergen, and F. W. Stevens, for the appellants.*

*A. V. Schenck, for the respondent.*

812 BEASLEY, C. J. On the part of the appellants, who were the defendants in the court of chancery, it is insisted on this appeal that the subject of the suit is not within the cognizance of a court of equity. In the process of deciding the case a jurisdictional objection of this nature must of necessity have precedence.

Looking at the bill before us in its general aspects it presents to our view neither more nor less than a controversy between two rival sets of directors of the corporate defendant, each claiming to be its legal representative, having as such the right to exercise the functions appertaining to their office. This is the sole ground on which jurisdiction over the case in hand can be claimed, for there are no other facts stated in the bill which even tend to strengthen, in this particular, the complainant's position. Indeed, such additional facts as are there exhibited must be deemed rather to impair than to add force to the contention that this contest is susceptible of equitable cognizance. The averments are to this effect: The complainant alleges that many years ago the commissioners named in its charter organized it in due form, and that subsequently certain persons were chosen directors, who still continue to be such; that a number of years after such organization, as the appellants contend, these same commissioners convened and received subscriptions for stock, and that the persons so subscribing elected the appellants to be directors. They also deny the legality of the election of the directors who are represented in the suit by the corporate body. The status of these parties is this: Each contends that the election of directors relied upon by his opponent is invalid for the want of a legal organization of the corporate body at the time of choosing, respectively, such officers. No one who examines

<sup>815</sup> the case with the least care can have any doubt upon this subject. There is no ground nor hint of any circumstances laying a further jurisdictional foundation.

If, therefore, the court of chancery had rightful cognizance of the controversy before us it was because that court has the power to arbitrate between rival claimants to corporate office.

A jurisdiction resting on this single basis was asserted and exercised in the present case in the inferior court, and the inquiry now arises, can that course of law be vindicated?

It does not seem possible to doubt that this conclusion just stated stands opposed to every thing that had preceded it in the shape of judicial decision and judicial declaration. The rule, as decided and expressed, was that a court of equity could not inquire into the legality of an existing corporation, except when such inquiry arose collaterally in a case within its cognizance, and that a dispute touching the election of directors did not, *per se*, constitute such a case. This doctrine is not only explicitly stated, but is just as explicitly enforced by decree, in the case of *Owen v. Whitaker*, 20 N. J. Eq. 122. The nature of the controversy in that instance was not merely similar, but was in all respects identical with that now present on this appeal, so that, if the present decision should be affirmed by this court as an inevitable concomitant, the reported decision would be repudiated as a precedent.

The facts to which the adjudication now referred to applied have been carefully collected and stated in the elaborate and very lucid brief of the counsel of the appellants, and may be thus summarized, viz: By the act incorporating the Sussex County Railroad Company sixteen persons were nominated as incorporators and commissioners. The capital stock of the company was fixed at one hundred and seventy-five thousand dollars. The commissioners gave notice, opened books, and received subscriptions in an amount exceeding one hundred and seventy-five thousand dollars, and thereupon apportioned the stock among all the subscribers. A controversy arose as to the right to make such apportionment. The persons who subscribed for the first one hundred and seventy-five thousand dollars of stock claimed that they were entitled to the full amount of their respective subscriptions, and that all the subscriptions <sup>816</sup> made in excess of such amount were void. The two classes of stockholders

thereupon elected two boards of directors, and a bill was filed by one class of stockholders and directors against the other class of stockholders and directors to ascertain which party were the true stockholders and directors.

It will be observed from this statement that the issue was, whether a court of equity was the appropriate tribunal to adjudge of the legality of these two several elections, and that is precisely what has been done in the present case. Nor is there a particle of doubt with respect to what Chancellor Zabriskie, who decided the case, considered the issue before him, nor with respect to the rule that was applied in disposing of such issue. He thus, certainly in very plain terms, states the problem he is called upon to solve. He says: "The first question in the cause is, whether the court has jurisdiction to determine whether an election of the directors of a private corporation has been legally held, and whether certain persons claiming to be and acting as directors are such." And in deciding this question he declares, emphatically: "This court has no jurisdiction to determine the validity of this election or the right of the directors elected to hold and exercise the office of directors, and therefore can grant no relief that is merely incident to that power, such as to restrain the directors from acting as such."

It has not been observed how it can be reasonably denied that this decision is as applicable to the facts now before this court as it was to the facts which led to it. As we think, the two cases are not to be differentiated by the existence of immaterial distinctions with respect to mere forms of procedure. The circumstances that, in the reported case, unlike the present proceedings, the corporation was not the complainant, and some of the prayers of the bill are variant from those in the bill before us, are obviously insignificant disagreements, for they neither did nor could affect the judgment. In the reported case the chancellor declared that he had no jurisdiction to determine whether an election of a private corporation has been legally held, and that he had no power to restrain the defendants from acting as such; and, in the present case his honor, the vice-chancellor, <sup>817</sup> has adjudged that he has the capacity to entertain such a controversy, and accordingly has restrained the defendants from exercising their alleged office.

It does not seem possible to avoid the conclusion that, in the present inquiry, the decision in *Owen v. Whitaker*, 20 N. J.

Eq. 122, is, with the utmost exactness, directly in point, and as it is the expression of the opinion of a very great and experienced jurist, and has existed and has been approved of for over twenty years, it cannot be hastily pushed aside, for all that can be done, in the presence of such a precedent, is to follow it, or, after full consideration and on the most stable grounds, to reverse it.

In deciding the case of *Owen v. Whitaker*, 20 N. J. Eq. 122, it is held that the statute laws of this state provide an ample remedy for the injury complained of, and the forty-fourth section to the Corporation Act (Revision, p. 184) was particularly referred to. That provision is in these words, viz: "It shall be the duty of the supreme court, upon the application of any person or persons, or a body corporate, who may be aggrieved by or may complain of any election or any proceeding, act, or matter, in or touching the same, reasonable notice having been given to the adverse party or to those who are to be affected thereby, of such intended application, to proceed forthwith and in a summary way to hear the affidavits, proofs, and allegations of the parties, or otherwise inquire into the matter or causes of complaint, and thereupon establish the election so complained of or to order a new election, or make such order and give such relief in the premises as right and justice may appear to said supreme court to require; *provided*, that said supreme court may, if the case shall appear to require it, either order an issue or issues to be made up in such manner and form as the supreme court may direct in order to try the respective rights of the parties who may claim the same to the office or offices or franchise in question, or may give leave to exhibit, or direct the attorney general to exhibit, one or more information or informations in the nature of a *quo warranto* in the premises."

The chancellor, in denying the jurisdiction of his court to determine the validity of an election of directors of a private corporation, describes this act as a "summary and efficient proceeding," created for the very purpose of determining the dispute before him, and he cites the case of *Mickles v. Rochester City Bank*, 11 Paige, 124, 42 Am. Dec. 103, in which Chancellor Walworth, passing on the same jurisdictional question, as well as the efficacy of an <sup>818</sup> identical New York statute, says: "The question as to the validity of the election of G., W., and S., as trustees, does not appear to be a proper subject of equitable cognizance. The legislature has provided a

summary remedy by an application to the supreme court to set aside the election of these directors of it as illegal. That court, therefore, is the proper tribunal to set aside the election if it has not been in conformity with law."

In the subsequent case of *Johnston v. Jones*, 23 N. J. Eq. 216, Chancellor Zabriskie reiterates, with emphasis, the doctrine declared by him in *Owen v. Whitaker*, 20 N. J. Eq. 122, and discriminates between the cases in which the jurisdictional foundation is laid simply in the averment of a disputed election, as in the instance we are now considering, and that other class in which such question comes in collaterally in the determination of matters over which equity has direct cognizance. The distinction is indisputable, and is recognized in every authority that has been noticed, and is nowhere more plainly declared than in the cases just cited. After repudiating, in express terms, the theory that a court of equity, in a direct procedure for that purpose, can inquire into the question of the right to an office, or as to the regularity of a corporate election, the very able chancellor then proceeds to set out the ground on which he vindicates his right to take charge of the controversy. He says: "That the defendant obtained an office claimed by him in a corporation by an election procured to be held by him by fraud, by breach of trust and a positive agreement, by concealment and treachery, confers on a court of equity jurisdiction to inquire into the validity of such an election, for the purpose of restraining the acts of the defendant and other persons claiming office by such election. That equity had jurisdiction of the question of the legality of one of these elections, where such question arises incidentally to the decision of fraud, a breach of trust will be denied by no one versed in the law; and this is what this particular case enunciates, but how such a doctrine has any tendency to support the hypothesis in which the present decree has been rendered is not apparent."

This view of the law on this subject, thus expressed by Chancellor Zabriskie, has received the weighty approval of the <sup>219</sup> late Vice-Chancellor Van Fleet. In the case of *Mechanics' Nat. Bank of Newark v. Burnet Mfg. Co.*, 82 N. J. Eq. 238, this very distinguished jurist says: "A court of equity has no jurisdiction to pass upon the validity of the election of the officers of a private corporation and pronounce judgment of a motion against them: *Owen v. Whitaker*, 20 N. J. Eq. 122. But where the question of the right or power of an



officer to represent or bind a corporation arises incidentally in the course of a suit, of which this court may properly take cognizance, and it becomes necessary to look into the legality of his election and the validity of his title, in order properly to determine the rights of the parties, this court will pass upon his title and capacity, as it would upon any other question of law or fact necessarily arising in the due determination of an action: *Johnston v. Jones*, 23 N. J. Eq. 216."

In the opinion of this court the jurisdictional rule is properly and accurately delineated in the decisions there referred to. The question of the right to corporate office or franchise is purely a legal one. It seems to have always been so regarded. It is many years since the subject was examined by Chancellor Kent, who, in the leading case of *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371, said that "The charge of the usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary that the jurisdiction of this court would have been placed beyond all possibility of doubt, and have been distinctly announced by a series of precedents if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the king's bench, and Kyd cites nearly an hundred instances, within the last century, of informations filed in the king's bench to call in question the exercise of a franchise."

It does not appear that the principle thus authoritatively declared in this series of decisions and in influential *dicta* has ever been rejected or challenged, except in the case now under review, and, it may be, in that of *Van Dyke v. Stout*, 8 N. J. Eq. 344. This latter decision was properly treated by Chancellor Zabriskie, <sup>230</sup> in *Owen v. Whitaker*, 20 N. J. Eq. 122, as of no account. It was decided, with respect to the facts, on an incidental motion, and the chancellor, in determining the matter, does not appear to have had the faintest suspicion that he was treading on jurisdictional ground that, to say the least of it, was unstable. It is probable that it was considered to be a case of fraud. As an authority on the point now being considered the case is worthless.

In conclusion, it is sufficient to say that the entire weight of authority is, in our opinion, opposed to the theory on which the decree appealed from was based. And, indeed, if there were no precedents relating to the subject, our conclusions, on general principles, would have been adverse to the juris-

diction exercised in the present instance. The controversy is exclusively a legal one; it has no trace of any thing to put it within the cognizance of an equitable tribunal, and the remedy at law is more complete than any other. The futility of a proceeding in equity is perfectly manifest. The present decree does not vacate the offices in question; it ties the hands of the defendants, but leaves them in their offices; and if the decision had been in their favor a decree to that effect would have been as useless as so much blank paper; it would have left the dispute between these two sets of directors absolutely untouched, for in that litigation the determination of the court in this proceeding would not have been legitimate evidence, for the class of directors who have pushed to the front the corporation as the *dominus litis* are not parties to the present bill.

In contrast to a legal course so uncertain and ineffectual, if we turn to the provision of the statute above referred to, it will be observed that, in our entire system of law, no remedy exists that is more simple and complete.

In short, we regard the rule of law applicable to the juncture before us as settled by an unbroken series of decisions, and it is obviously so regarded by the text-writers. It is thus enunciated by Spelling, in his late work on Private Corporations, section 396: "A court of equity will not entertain jurisdiction of a suit the purpose of which is merely to test the legality of the election of directors or to remove <sup>§31</sup> an officer of a corporation who is in actual possession. Yet, where the question arises incidentally and collaterally in a suit rightly filed for another purpose, the court will decide it." Taylor also states the rule in the same way: Taylor on Private Corporations, sec. 381. These texts are warranted by a number of authorities and in the notes.

Let the decree appealed from be reversed and the bill dismissed.

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**EQUITY—JURISDICTION OVER ELECTION OF CORPORATE OFFICERS.**—Chancery has no jurisdiction to determine the validity of an election of trustees of a corporation, the legislature having provided a summary remedy by application to the supreme court: *Mickles v. Rochester City Bank*, 11 Paige, 118; 42 Am. Dec. 103, and note in which the cases are collected.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**OHIO.**

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**HICKEY v. LAKE SHORE & MICHIGAN SOUTHERN  
RAILWAY COMPANY.**

[51 OHIO STATE, 40.]

**CONVEYANCES.—COVENANTS WHICH ARE CONNECTED WITH THE ESTATE RUN WITH THE LAND,** and vest in point of benefit and liability in an assignee.

**CONVEYANCES—GRANTEE NOT SIGNING DEED.**—When a grantee accepts a deed and goes into possession under it he is bound by the conditions contained in the deed as effectively as if he had signed and sealed the instrument.

**CONVEYANCES—COVENANTS AND CONDITIONS WHICH ARE BINDING ON THE GRANTEE AND HIS SUCCESSORS IN INTEREST.**—If a conveyance declares that it is made subject to the condition that the grantee, his heirs and assigns, shall make and maintain a good and sufficient fence at certain points named therein, and that this condition shall be perpetually binding on the owners of the lands granted, and the grantee and his assigns do not comply with such condition, the grantor may himself construct or repair the fence stipulated for, and maintain an action for reimbursement against the original vendee and his grantees to charge each with the expense of that portion of the fence upon the lands owned by him.

**CONVEYANCES.—COVENANTS AND CONDITIONS, DIVISIBILITY OF LIABILITY UPON.**—If a condition is annexed to a grant that the grantee, his heirs and assigns, will maintain a fence upon certain lands designated, and the grantee conveys portions of the premises, his liability as to such portions terminates, and his grantees are liable for the respective portions owned by him.

**ACTION** against James Hickey for failure to maintain a fence. His liability depended upon a condition in the conveyance by which he acquired title from the plaintiff in this action, and which declared that such "conveyance is made

subject to the condition that said James Hickey, his heirs and assigns, shall make and maintain a good and sufficient fence on each side of the right of way of the Lake Shore & Michigan Southern Railway, which condition and obligation shall be permanently binding on the owners of the land." After receiving the conveyance Hickey sold and conveyed sundry parcels to divers persons. Notice was given both to Hickey and his several grantees to repair the fence, and on their failure to do so the plaintiff repaired it at its own expense. To a petition averring these facts a demurrer was interposed on the ground of a defect of parties defendant, and that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff then prosecuted a writ of error to the circuit court, which reversed the judgment against it, and remanded the cause for a new trial. Thereupon the defendant Hickey instituted these proceedings for a reversal of the judgment of the circuit court.

*G. M. Barber and A. W. Barber, for the plaintiff in error.*

*Estep, Dickey, Carr & Goff, for the defendant in error.*

<sup>45</sup> DICKMAN, J. In December, 1874, the railway company executed and delivered to James Hickey, the plaintiff in error, a deed, duly recorded thereafter, of three hundred and eighty-two acres of land, situate in Cuyahoga county, Ohio, and the grantee entered into possession of the granted premises. The deed contained the following condition and agreement: "This conveyance is made subject to the condition that the said James Hickey, his heirs and assigns, shall make and maintain good and sufficient fences on each side of the right of way of the Lake Shore & Michigan Southern Railway as now located, . . . which condition and obligation shall be perpetually binding on the owners of the land."

Subsequently to the conveyance Hickey sold to different parties sundry parcels of the same land. The fences along the line of the railway and in front of the several parcels thus sold becoming out of repair, the railway company requested each of the vendees and occupiers of the parcels of land purchased from Hickey to repair and reconstruct the fences in accordance with the condition and agreement in the deed from the railway <sup>46</sup> company. Upon the vendees and occupiers refusing and failing so to do, the company caused the

fences to be repaired and rebuilt in a manner sufficient to turn stock and animals as required by law, and commenced the original action to recover the cost and expense of such repairing and rebuilding.

The question presented is, whether the cost and expense so incurred should be borne by the plaintiff in error, the first grantee, or by his respective vendees along the lines of whose lands the fences have been repaired or rebuilt.

It was resolved in *Spencer's case*, 5 Coke, 16, that the law would not annex the covenant to a thing which had no being at the time of the demise, as in the case of a covenant by a lessee to build a wall upon part of the land demised; and if the covenant should be entered into by the lessee for himself, his executors and administrators, without naming his assigns, the lessee, his executors or administrators would be bound, and not his assignee. But, it was also resolved, that if the lessee had covenanted, for himself and his assigns, to make a new wall upon some part of the thing demised, forasmuch as it was to be done upon the land demised, it would bind the assignee; for although the covenant extended to a thing to be newly made, yet, as it was to be made upon the thing demised, and the assignee was to take the benefit of it, it should bind the assignee by express words: *Spencer's case*, 5 Coke, 16, resolutions 1, 2; 1 Smith's Leading Cases in Equity, 68. In other words, the covenants which are connected with the estate run with the land, and vest in point of benefit and liability in the assignee.

Nor is this principle to be restricted in its application to leases or deeds *inter partes*, executed by <sup>47</sup> both lessor and lessee, or grantor and grantee. Where a grantee accepts a deed, and goes into possession of the premises under it, he is bound by the conditions contained in the deed as effectually as if he had signed and sealed the instrument. Although not executing the instrument, he should be deemed to have entered into an express undertaking to do what the deed says he is to do; and such undertaking or obligation imposed upon and assumed by the grantee, if not technically a covenant running with the land, is, nevertheless, an agreement of the grantee, evidenced by his acceptance of the deed, which might bind him and his personal representatives, and, by express words, his heirs and assigns.

In *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633, it was held that a clause in a deed poll to the effect that the

grantee agrees for herself and for her heirs and assigns, that she and they would forever make and maintain a fence all around the granted premises, was of the same effect as an express covenant, signed and sealed by the grantee; that it would run with the land; that it created an incumbrance upon the land; and, by implication, it was recognized that a subsequent grantee would be liable to the original grantor in an action of assumpsit for nonperformance of the stipulation. A decision substantially similar was rendered in *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550.

And, in *Georgia Southern R. R. Co. v. Reeves*, 64 Ga. 492, the grantor, in consideration of twenty-five dollars, and of the building of the railroad, conveyed to a company, its successors or assigns forever, in fee simple, the right of way through his land, and added in the deed the words: "It is hereby agreed and understood a depot and station is to be <sup>as</sup> located and given to said Reeves, on the land or strip above conveyed, to be permanently located for the benefit of said Reeves and his assigns, and to be used for the general purposes of the railroad company." It was held that the grantee, by accepting such deed, entered into a covenant to comply with its terms, and this covenant ran with the land and became obligatory upon any second company which became the purchaser, under proper legal direction of the rights, privileges, franchises, and property of the former: See, also, *Countryman v. Deck*, 13 Abb. N. Cas. 110.

If the conditions, stipulations, or covenants in a deed poll may thus run with the land, and bind the first grantee and subsequent purchasers from him, why, it is inquired, should not the plaintiff in error, as well as his grantees, be holden to perform the condition and obligation contained in the deed from the railway company? If the conveyance had been made subject only to the condition that "James Hickey, his heirs and assigns," shall make and maintain good and sufficient fences on each side of the right of way of the railway, the railway company, we think, might, at its election, pursue either the original grantee or his vendee, or both, for payment. But the conveyance contains the further provision that such "condition and obligation shall be perpetually binding on the owners of the land." This provision cannot be regarded as meaningless and without design. In the construction of deeds the object of all rules is to ascertain the intent of the parties. And, in construing the words of a

grant, of covenant, of qualification, condition, restraint, exception, or explanation, every word should be presumed to have been used for some purpose, and should be deemed to have some <sup>49</sup> force and effect, if it can have: Devlin on Deeds, sec. 840; *Salisbury v. Andrews*, 19 Pick. 250, 252.

In the case before us the railway company conveyed the land in fee, and, as part consideration, imposed a condition for making and maintaining fences which was to be "perpetually binding on the owners of the land." The meaning of the condition, we think, was to place upon Hickey an obligation to make and maintain the fences only during the time he was the owner of the land. At his death his heirs, upon succeeding to the ownership, would be held to make and maintain the fences while their ownership lasted. If he or his heirs or devisees should sell the land the assignees would likewise be held while they continued to be owners, the obligation thus running with the land. Manifestly, it was not Hickey's intention to assume an obligation *in perpetuum*, and after having sold and conveyed the premises in fee, to remain bound for life, and his heirs to be bound after his death, to build and keep up the fences between the right of way and the land sold. And, in getting at the intention of the railway company, the obvious inference would be, that the company would naturally provide for a recourse to those who might own the land at the time the fences needed repairing or rebuilding, rather than to its grantee and his heirs, who might, perhaps, at the time be dead or unable to be found. We cannot but conclude that the company intended, when the land was conveyed, to trust to the land and its owners for a performance of the condition contained in the deed, and not to its grantee after he ceased to be the owner. The fact that the company imposed the condition that the grantee and "his assigns" should make and maintain the fences, and added thereto that <sup>50</sup> the condition or obligation should be perpetually binding on "the owners of the land" would indicate an intention to make ownership the test as to who should be bound to perform the condition in the deed.

In *Worthington v. Hewes*, 19 Ohio St. 66, there was a demise of certain real estate to the lessee and his assigns, for ninety-nine years, renewable forever. The lease provided that the rent was to be fixed by a reappraisal of the premises every fifteen years. The stipulation in the lease as to the mode of appointing appraisers was held to be a covenant

running with the land, and not a collateral covenant. For all substantial purposes the estate was treated as a leasehold estate in name and in form only. The lessor, in effect, having parted at once with his entire estate, the lessee was deemed to have taken in form a chattel, but in fact an estate in fee. The liability of the lessee for rents was regarded as simply a question of intention; and it was held that, after an unconditional assignment by the lessee, he was not liable for future rents and had no right to interfere in the appointment of appraisers, which was a matter to be adjusted, not by the original parties to the lease, but by their assignees. The decision, though not altogether decisive, is, in a measure forcibly illustrative of principles involved in the case at bar.

The judgment of the circuit court, in our opinion, should be reversed and that of the court of common pleas affirmed.

Judgment accordingly. —

**COVENANTS RUNNING WITH LAND—GENERALLY.**—A covenant does not run with the land unless contained in a grant thereof or of some estate therein: *Fresno Canal Co. v. Rowell*, 80 Cal. 114; 13 Am. St. Rep. 112. An essential quality of a real covenant is that it relates to the realty, having for its object some thing annexed to or inherent in or connected with land or real property: *Morse v. Garner*, 1 Strob. 514; 47 Am. Dec. 565, and extended note; *King v. Kerr*, 5 Ohio, 154; 22 Am. Dec. 777. See, also, the extended note to *Gibson v. Holden*, 56 Am. Rep. 167.

**COVENANTS RUNNING WITH LAND—BUILDING AND MAINTAINING FENCE.** A covenant by a grantor in a deed forever to maintain a fence or wall between the granted premises and the grantor's premises runs with the land: *Haslett v. Sinclair*, 76 Ind. 488; 40 Am. Rep. 254. A covenant that the grantee shall keep and maintain a partition fence between the lands conveyed and those of the grantor runs with the land: *Kellogg v. Robinson*, 6 Vt. 276; 27 Am. Dec. 550; *Burbank v. Pillsbury*, 48 N. H. 475; 97 Am. Dec. 633, and notes. See the extended notes to *Gibson v. Holden*, 56 Am. Rep. 161, and *Morse v. Garner*, 47 Am. Dec. 575.

## BAIRD v. HOWARD.

[51 OHIO STATE, 57.]

**FRAUD IN CONTRACTING WITH AN INTOXICATED OR INCOMPETENT PERSON.**—

To secure possession of property by means of a contract made with its owner by one who at the time knows him to be incapable of entering into a contract constitutes a fraud.

**FRAUD, ACTION TO RECOVER DAMAGES FOR PROCURING A CONTRACT BY—REMISSION NOT NECESSARY.**—If a person knowingly and fraudulently takes advantage of an owner's intoxication to procure a contract from

him for the purchase of his property at an inadequate price which he knows the owner would not accept if sober, and thereby on the pay-



ment of such price he obtains such contract and possession of the property, the owner may maintain an action to recover the damages sustained by him without first rescinding the contract and offering to return the consideration received for it.

**EVIDENCE TO PROVE ERROR OF INTOXICATION UPON MENTAL CAPACITY.**—In an action to recover damages for taking advantage of plaintiff's intoxicated condition for the purpose of obtaining from him a contract for the sale of his property at an inadequate price, evidence that, a few days prior to the making of the contract and when sober he had placed upon such property a value widely variant from that at which it was sold is admissible because it tends to show the extent to which intoxication had affected his judgment.

*Frank Taggart and E. S. Dowell*, for the plaintiff in error.

*A. D. Metz*, for the defendant in error.

61 BRADBURY, J. The plaintiff, now plaintiff in error, sets forth his claim in the court of common pleas in an amended petition as follows: "The plaintiff now comes, and by leave of the court, first had and obtained, and files this his amended petition in this case, and says: 'That on the 18th day of August, A. D. 1886, the plaintiff was intoxicated to such an extent, that by reason thereof he was totally unable and unfit to make or enter into a valid contract of any kind. That the defendant, 62 then well knowing the condition of the plaintiff, and that he was then intoxicated to such an extent that he was wholly unfit and unable by reason thereof to make or enter into a valid or binding contract, and then intending to cheat and defraud the plaintiff, bargained with, and then induced and procured the plaintiff, while so intoxicated, to sell and deliver to him, the defendant, the undivided one-half interest in all the livery stock, consisting of horses, carriages, harness, whips, robes, and all other property then owned by the plaintiff and one Jerome T. Baird as partners under the firm name of Baird & Son. That said undivided one-half interest in said livery stock, so sold and delivered by the plaintiff to the defendant, was then of the value of \$1,600; yet the defendant, then well knowing that the said undivided one-half interest in said livery stock was of the value of \$1,600, and then intending to cheat and defraud the plaintiff, induced and procured the plaintiff, while so intoxicated as aforesaid, to sell and deliver said undivided one-half interest in said livery stock to the defendant for the sum of \$1,000 and no more; and, while so intoxicated and intending to cheat and defraud the plaintiff, the defendant caused and procured the plaintiff to enter into a written contract between

him and the plaintiff wherein and whereby it appears that the plaintiff sold and delivered said one undivided half interest in said livery stock to the defendant for the sum of \$1,000 and no more. The plaintiff says that if he had been sober and capable of transacting such business on said 18th day of August, 1886, he would not have entered into said written contract with the defendant, and would not have sold and delivered his said undivided one-half interest in said delivery stock to the defendant for less than <sup>as</sup> \$1,600 cash. That his said undivided one-half interest in said livery stock was then worth the sum of \$1,600 cash, and that the sum of \$1,000, the amount paid by the defendant to the plaintiff therefor at the time and in the manner aforesaid, was a grossly inadequate price and consideration therefor, and the defendant then well knew it. That the defendant then well knew that \$1,000 was a grossly inadequate price and consideration for the said undivided one-half of said livery stock, and then knew that if the plaintiff was sober and capable of transacting such business as that of selling and disposing of his interest in said livery stock, that the plaintiff would not then have accepted the sum of \$1,000 as a full consideration for his interest in said livery stock, which he had sold and delivered to defendant as aforesaid, but intending to cheat and defraud the plaintiff, the defendant purchased from the plaintiff the said interest in said livery stock for the sum of \$1,000 as in the manner aforesaid, and which stock the plaintiff then delivered to defendant. The plaintiff says that, by reason of the premises, he has been cheated, wronged, and defrauded by the defendant out of the sum of \$600.

“The plaintiff therefore prays judgment against the defendant for the sum of six hundred dollars, with interest from August 18, 1886.”

To this petition a demurrer was interposed by the defendant, which the court of common pleas overruled, and to which ruling the defendant excepted. An issue of fact was then joined between the parties, upon the trial of which the plaintiff offered to prove the price he had placed upon the livery stock before the sale, while sober. The defendant objected to its admission; his objection being overruled and the evidence admitted he <sup>as</sup> entered an exception thereto. It was upon these two grounds that the circuit court reversed the judgment, that court holding that the amended petition, as

above set forth, did not disclose a cause of action, and that evidence of the value the plaintiff had, while sober, placed upon the property just previous to the sale was not admissible.

1. In support of the holding of the circuit court that the amended petition did not state a cause of action counsel contends that plaintiff's only remedy was to rescind the contract, which he could accomplish in either of two ways: 1. By a suit in equity; 2. By an offer to return the consideration he had received, coupled with a demand for the restoration of his own property, after which, if the defendant did not consent to a restoration, an action in replevin or in trover would lie. That these remedies were open to the plaintiff is apparent, and is in fact admitted by his counsel; but he contends for still another, namely, the right, without a prior formal rescission of the contract, to maintain an action to recover the difference between the value of the property and the price received. Such an action could not be regarded as being on the contract, for instituting an action directly on the contract would be an affirmation of it, and, if the contract should be affirmed, he could not recover; for, according to its terms, he had been fully paid. The institution of such an action might be regarded, perhaps, as a rescission; but, if the defendant's possession was rightful up to the moment of the filing of the petition, the principle upon which that possession would be instantly transformed into a wrongful one is not very apparent. If its unlawful character grew out of the rescission the defendant should have been afforded <sup>as</sup> an opportunity to restore the property before being held a wrongdoer. If, however, the method by which the defendant obtained possession was wrongful, there would be consistency in holding the possession thus obtained to have been wrongful at its inception.

The petition avers that the defendant, with intent to cheat and defraud the plaintiff, induced the latter to enter into the contract under consideration, and to deliver to the defendant the property involved in the controversy, with knowledge that the plaintiff was "unfit and unable to make or enter into a valid contract," because his senses were dulled by intoxication. The demurrer admitted this to be true. It thus appeared not merely that a contract had been made, but that the defendant had secured the possession of the plaintiff's property by knowingly taking advantage of the latter's tem-

porary incapacity. Had possession been taken while the plaintiff's senses were overcome by sleep no one would deny that such a possession was wrongful. The difference between the character of a possession secured by the latter method and one deliberately obtained through the medium of an invalid contract, made with one whose senses the possessor knew at the time were stupefied by excessive intoxication, is one of degree rather than principle. That in the former case the transaction would involve a trespass and present none of the features peculiar to contracts, while in the latter case it took the form of a contract, is a distinction possessing little if any materiality in this connection. The fraud inhering in the one should be deemed a substantial equivalent to the force involved in the other method of obtaining possession. Each is wrongful. To secure the possession of property <sup>66</sup> by means of a contract made with its owner by one who at the time knew him to be incapable of entering into a contract constitutes a fraud.

In such case, it is true, a contract exists which the incapacitated party has an option to affirm or rescind. But, because the one party may exercise this option, it does not follow that the other party may compel its exercise as a condition precedent to obtaining any relief. If, when restored to capacity, the former is satisfied with the contract, and wished to enforce its provisions, he can affirm and maintain an action upon it; if he had, in fact, received a substantial part of the consideration secured to him by the contract, and wished to recover possession of the property with which he had been induced to part, he should be required to rescind the contract, and restore that part of the consideration which had been paid him, for he should not be allowed to retain the latter, and at the same time recover possession of the former.

Where one person, ignorant of the incapacity of another person, deals with the latter and obtains possession of his property, the possession of the former should not be deemed wrongful until the contract is rescinded, and a demand for the property made upon him. The mutual rights or liabilities of persons thus situated, however, should not be the measure of the rights and liabilities of parties, where the possession of the property of one has been wrongfully obtained by the other. The wrongful acts by which possession was secured become material factors in determining the question. If a possession thus obtained is continued under circum-

stances from which it may be fairly inferred that the party in possession is exercising <sup>67</sup> dominion over the property to the exclusion of the right of the party wrongfully dispossessed, the latter may regard such acts as constituting a conversion of the property.

We have found no case in all respects similar to the one under consideration, but, in a number of well-considered cases, courts have held that, where the purchase of goods has been effected by false representations, the vendor may maintain trover against the vendee without demand: *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Green v. Russell*, 5 Hill, 183; *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Noble v. Adams*, 7 Taunt. 59; *Bristol v. Wilmore*, 2 Dowl. & R. 755.

In the procedure prescribed by our Civil Code all the ancient common-law actions are abolished; all are merged into one "civil action," and, even if the facts stated in the petition did not disclose a technical conversion, they constitute fraud to the injury of the plaintiff, as we have seen. The remedy should be as broad as the injury. The party guilty of the fraud should not be allowed to shield himself by a contract procured in this way and insist upon immunity for the fraud until the contract has been formally rescinded.

2. The principal dispute between the parties at the trial in the court of common pleas related to the competency of the plaintiff to make a contract at the time the one in contention was entered into. One means of ascertaining this, was to contrast him, as he conducted and expressed himself on that day, with himself as, according to his conduct, his opinions and expressions, he appeared on other days when known to be duly sober. That a few days before the sale, at a time when he was sober, he had placed upon the property a value that widely varied from that at which it was sold, <sup>68</sup> reflected upon the extent that his judgment had been affected by the liquor he had drank.

That such evidence might be considered by the jury for some other and improper purpose, as, for instance, in determining the value of the property and the damages, does not render its admission erroneous. If competent for any purpose it was admissible.

Whenever it becomes necessary to inquire into the mental condition of a person, and there are other issues in the cause, much evidence is usually admitted which, but for that issue,

would be incompetent; and in such cases the court, upon the request of a party, should caution the jury to limit its effect to the issue to which it is lawfully applicable.

The charge of the court is not printed in the record; but we should presume that the trial court did its duty, and therefore either limited to its proper office the evidence objected to, or, if requested by the defendant, would have done so.

Judgment of the circuit court reversed and that of the common pleas affirmed.

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**FRAUD IN CONTRACTING WITH INTOXICATED PERSON.**—A contract obtained from a person intoxicated to such a degree that he cannot consent understandingly will in equity be decreed to be canceled: *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441; *Crane v. Conklin*, 1 N. J. Eq. 346; 22 Am. Dec. 519, and note. A promissory note obtained for an insufficient consideration from a person enfeebled in mind and body by disease and long continued drunkenness, and at the time of its execution under the influence of intoxicating liquor, is presumptively fraudulent: *Holland v. Barnes*, 53 Ala. 83; 25 Am. Rep. 595. See, especially, the extended note to *Lancaster County Bank v. Moore*, 21 Am. Rep. 29.

**CONTRACT PROCURED BY FRAUD—DAMAGES.**—Where a party has been induced by fraud to enter into an executed contract for the purchase of property he may either rescind and recover back the consideration paid or affirm the contract and recover damages for the fraud: *Bowen v. Mandeville*, 95 N. Y. 237, cited in *Fowler v. Rowery Sav. Bank*, 10 Am. St. Rep. 435. See, also, the extended note to *Cottrill v. Krum*, 18 Am. St. Rep. 555.

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## STATE v. CARPENTER.

[51 OHIO STATE, 83.]

**MANDAMUS WILL NOT LIE TO COMPEL THE ISSUING OF STOCK IN A PRIVATE CORPORATION** if the statute of the state in which the writ was applied for forbids its issuing where there is a plain and adequate remedy in the ordinary course of law. The remedy of the party entitled to such issuing is either at law to recover damages or in equity to compel the officers of the corporation to execute and deliver a proper certificate of stock.

**PLEADING—CONCLUSION OF LAW.**—An allegation in a petition for a writ of mandamus that the relators have no remedy at law amounts to nothing more than a declaration of the pleader's opinion, and as an allegation of fact is without force.

*Northway & Fitch and Tracy Barnum*, for the plaintiff in error.

*George A. Groot*, for the defendants in error.

**vs WILLIAMS, J.** The original action was mandamus, brought in the court of common pleas of Ashtabula county, by the plaintiff in error, against the president, secretary, and treasurer of the Baker Engine & Machine Company, a manufacturing corporation organized in this state, to compel them to issue to the relators, Bross and Baker, certificates for three hundred and ten shares of the company's stock, of one hundred dollars each, which, it is alleged, the relators duly subscribed and paid for, and for which the defendants refuse to issue certificates to them. The relators allege that they have no adequate remedy at law, and pray for a peremptory writ. The answer denies that the relators paid for the stock, or paid any sum whatever on their subscription, and avers they are indebted to the company for the full amount thereof, namely, thirty-one thousand dollars. The court found the issues for the defendants; and held, furthermore, that the remedy of the relators at law was adequate, and on both grounds denied the writ. The circuit court, to which the cause was taken on appeal, stated its conclusions of fact and of law separately, at the request of the plaintiff. It found that the relators fully paid for the stock, and were entitled to the certificates, but held their remedy was in equity, and for that reason refused the writ; and it is claimed here that in so holding that court committed an error.

The cases are in conflict upon the question whether the remedy by mandamus may be employed to compel the issue or transfer of certificates <sup>67</sup> of stock of a private corporation. The remedy, in this state, is controlled by statutory regulations which define the writ, and determine the cases in which it may issue. "Mandamus is a writ issued in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station": Rev. Stats., sec. 6741. A limitation upon the remedy is contained in section 6744, which provides that "The writ must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law." The duty of issuing certificates of stock of a private corporation, to those entitled to receive them, is specially enjoined upon its officers, it is claimed, by the following provision contained in section 3254 of the Revised Statutes, viz: "Stockholders shall be entitled to receive certificates of their paid-up stock in the company; and the president and secretary of the

company shall, on demand, execute and deliver to a stockholder a certificate showing the true amount of the stock held by him in the company." And we think there can be no doubt that such a corporation is bound, through its proper officers, to issue to each stock subscriber who has fully paid for his stock a certificate truly representing his interest in the corporation. But the question still remains, what is the appropriate remedy for the refusal or failure to do so? If there be "a plain and adequate remedy in the ordinary course of the law," the courts are prohibited by statute from issuing the writ of mandamus. Shares of stock in a private corporation are personal property; and it has long been settled that an action for damages for their conversion may be maintained, upon the refusal, on demand, to issue or transfer certificates to persons entitled to them. True, there has not always been uniformity in the rule applied in determining the measure of the damages in such cases; it being held in some, that the value of the stock at the time of the conversion is the measure of the damages that may be recovered; in others, its value at the time of the trial; and in others still, its highest value at any time between the conversion and trial. The first of the rules above stated is the one which seems generally to prevail, unless there is some thing in the nature or circumstances of the conversion which enhances the damages. But the damages are not necessarily limited to the market value of the stock. Its actual value may be recovered; and that may be shown by proof of the value of the property and business of the corporation, its goodwill, and dividend-earning capacity: *Freon v. Carriage Co.*, 42 Ohio St. 38; 51 Am. Rep. 794; *Cook on Stock and Stockholders*, sec. 581.

Besides, "remedy in the ordinary course of the law," is not confined to those actions which, before the adoption of the Civil Code, were actions at law, but embraces what were suits in equity as well; and if, for any reason, an action for damages might prove inadequate for the full redress of the relators' injury, we see no reason why they could not obtain that complete measure of relief in equity. It was held by this court, in *Iron R. R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84, that a suit in equity may be maintained against a corporation to compel it to issue a stock certificate to a subscriber, or his assignee, upon tender of the sum subscribed. Indeed, that remedy is well established, and is the one gen-



erally pursued in such cases, and also in cases where <sup>oo</sup> the transfer of stock on the books of the corporation, or a certificate of such transfer, is sought: Cook on Stock and Stockholders, secs. 61, 391. In the last section cited, that author says, the remedy by suit in equity is the most complete and most just one for compelling a corporation to register a transfer of stock, and "is a remedy applicable to almost all cases arising under a refusal of a corporation to allow a registry of transfer. The case will be decided on equitable principles, however, and a transfer will not be decreed if it involves bad faith. The relief usually demanded is in the alternative, being either for a registry of the transfer or damages in lieu thereof." The reasons which conduce to the holding that a suit in equity is the most satisfactory and complete remedy to accomplish the registration of transfers of stock apply equally when the object sought is the issue of certificates originally. Mandamus is not well adapted to the trial of questions of fact or the determination of controversies of a strictly private nature. Its office is rather to command and enforce the performance of those duties in which the public have some concern, and where the right is clear, and does not depend upon a complication of disputed facts which must be settled from the conflicting testimony of witnesses.

There is nothing in the facts of the case before us which shows that an action for damages, or suit in equity, would not furnish the relators a plain and adequate remedy for the wrong complained of. It is not alleged that the corporation has refused to admit them as members of that body, or denied them the right to vote or be voted for, or to exercise their privileges as stockholders; nor, that any of their personal advantages or privileges as such <sup>oo</sup> have been interfered with. The writ of mandamus has sometimes been issued to compel the admission of members in corporate bodies when essential to the preservation of personal advantages to which they show themselves to be clearly entitled. The petition alleges, in general terms, that the relators "have no remedy at law"; but that amounts to nothing more than a declaration of the pleaders' opinion, and, as an allegation of fact, is without force. Our conclusion is, that where the officers of a private corporation, organized for profit, refuse, upon demand, to issue a certificate of stock to a person entitled thereto, his appropriate remedy is by action against the corporation for damages, or in equity to enforce the issue and

delivery of the certificate. If, for any reason, the one does not, the other will, afford him a plain and adequate remedy, and he may resort to either at his election. Mandamus cannot, therefore, be properly invoked.

Judgment affirmed.

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MANDAMUS DOES NOT LIE TO COMPEL THE TRANSFER OF STOCK by a private corporation to a purchaser: *Freon v. Carriages Co.*, 42 Ohio St. 30; 51 Am. Rep. 794, and extended note; *Kimball v. Union Water Co.*, 44 Cal. 173; 13 Am. Rep. 157; *contra*, *Bailey v. Strohecker*, 38 Ga. 259; 95 Am. Dec. 388, and note.

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## CINCINNATI OYSTER & FISH COMPANY v. NATIONAL LAFAYETTE BANK.

[51 OHIO STATE, 106.]

**BANKING—CERTIFIED CHECK.**—The fact that the drawer of a check procures it to be certified by the bank on which it is drawn, before delivering it to the payee, does not relieve the latter from the necessity of making due presentation and giving due notice of default if he wishes to hold on to the liability of the drawer, but such certification does not discharge the drawer, where the bank becomes insolvent, if the payee shows proper diligence in presenting the check for payment and giving notice of its dishonor.

**BANKING—CERTIFIED CHECK.**—IF THE DRAWER OF A CHECK DELIVERS IT ALREADY CERTIFIED the relations, duties, and obligations between him and the payee or holder are the same as if such check had not been certified. It is otherwise where the check is delivered without certification, and the holder, instead of presenting it for and receiving payment, presents and procures it to be certified.

**PAYMENT.**—A CERTIFIED CHECK, given in the ordinary course of business and unattended by special circumstances, is not presumed to have been received as absolute payment.

*W. W. Symmes*, for the plaintiff in error.

*Frank V. Andrews and Healy & Brannon*, for the defendant in error.

108 DICKMAN, C. J. The plaintiff in error, the Cincinnati Oyster & Fish Company, is a corporation organized under the laws of Ohio; and the defendant in error, the National Lafayette Bank, is a corporation organized under the laws of the United States. In June, 1887, the Lafayette Bank received from a banking correspondent in Michigan, for collection, a sight draft for fifty-four dollars, drawn upon the plaintiff in error. On the twentieth day of June, 1887, the plaintiff in error, on receiving the draft from the Lafayette Bank, gave

to that bank, in exchange, its check for fifty-four dollars, already, by the procurement of the plaintiff in error, certified by the Fidelity National Bank of Cincinnati, Ohio. The following is a copy of the check and its certification:

"No. 344.

CINCINNATI, June 20, 1887.

"The Fidelity National Bank pay to the order of National Lafayette Bank, fifty-four dollars.

"THE CINCINNATI OYSTER & FISH COMPANY.

"\$54.00.

STEPHEN CHASE, Superintendent.

"(Certification.)

"Good for \$54.00, when properly indorsed.

"FIDELITY NATIONAL BANK,

"AMMI BALDWIN, Cashier."

On the same day—the 20th of June—the amount of the check was at once credited by the Lafayette Bank to the account of its banking correspondent. The check was duly indorsed and duly presented to the Fidelity National Bank on the twenty-first day of June, 1887, and payment was refused—the Fidelity Bank having failed and closed its doors. The check was duly protested on the same day for nonpayment, and notice of such nonpayment was served upon the plaintiff in error at its place of business in Cincinnati.

100 Demand of payment of the check was made upon the plaintiff in error, and payment was by it refused.

At the time of the transaction between the parties to this cause, it was usual and customary for banks and bankers in Cincinnati to send notices to persons owing accounts at banks, that "checks on other banks are not received in payment for drafts after half-past one o'clock unless certified"; and for those receiving such notices, to take up and pay off drafts or other mercantile paper with certified checks. But while it was thus the general rule of banks and bankers to require checks offered in payment of drafts, notes, or other mercantile paper after half-past one o'clock to be certified, that rule was not such that it might not be permitted to go unobserved, if the party receiving the check was satisfied that it was good, or that the party drawing it was responsible.

The record presents only one question that claims our consideration, and that is, can the drawer of a certified check be held liable for its payment, where it is certified by the bank at his own instance, request, or procurement, before he delivers it to the payee.

Among the numerous definitions of checks which the text-writers give, that of Mr. Daniels, in his treatise on Negotiable Instruments, section 1566, has been very generally approved. A check is there defined as, "a draft or order upon a bank or banking-house, purporting to be drawn upon a deposit of funds for the payment at all events of a certain sum of money, to a certain person therein named, or to him or his order, or to bearer, and payable instantly on demand." It is an absolute transfer or appropriation of so much money, in the <sup>110</sup> hands of the drawee. If the payee or holder presents the check for payment before the close of banking hours on the next day after its date, and payment is refused, the drawer, if duly notified, will be liable. And the drawer will not be discharged from liability by the delay of the holder to make presentment and give notice of dishonor, unless he has suffered loss thereby; and if the bank remains solvent, and the fund upon which the check is drawn is unaffected by the delay, the liability of the drawer continues, ordinarily, in full force.

The certification of the check by the bank as "good" procured by the drawer, on his own motion, before its delivery to the payee, will not relieve the latter from the necessity of making due presentment and giving due notice of its dishonor, if he would hold on to the liability of the drawer; nor will such a certification discharge the drawer where the bank becomes insolvent, if the payee uses the proper diligence in presenting the check for payment, and giving notice of its dishonor. In other words, where the drawer of the check delivers it already certified, the relations of the payee or holder and the drawer are not affected by the circumstance that the check is certified; their duties and obligations toward each other remain the same as they would have been had the check not been certified.

Upon the presentation of the check by the drawer to the bank for certification, it becomes manifest that it is designed to be negotiated, and that the drawer, to facilitate its negotiation, seeks to strengthen his own obligation by adding to it that of the bank. The certification becomes an acknowledgment by the bank that the drawer has funds <sup>111</sup> on deposit, which the bank will pay over to the holder of the check upon its being presented. Assurance is thereby given to the payee that the check has not been drawn without provision to meet its payment. A check so certified, when offered in

taking up drafts, notes, or other mercantile paper, if it is received too late to pass through the clearing-house on the day when offered, may inspire confidence that when presented the next day for payment it will not be dishonored. But such an enlargement of the security is not to be construed into an absolute discharge of the drawer of the check. By simply receiving the check in the form in which it is presented the holder does not make the drawee his sole debtor, as when, after becoming the owner, the holder procures the certification of the check—thus voluntarily making the bank upon which it is drawn his sole debtor, and releasing the drawer: *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St. Rep. 812.

It is said, however, in behalf of the plaintiff in error, that the drawer of the check in dispute caused it to be certified by the requirement of the Lafayette Bank. The record does not lead us to that conclusion. It is not anywhere stated that the notice was sent to the plaintiff in error, that checks on other banks would not be received in payment for drafts after one and a half o'clock, unless certified. The bank notified the plaintiff in error that it held for collection the sight draft received from its banking correspondent in Michigan, but what else that notice contained does not appear, as the notice itself was not offered in evidence. As agreed to by counsel for the parties to the cause, the plaintiff in error received from the Lafayette Bank the sight draft, "and, in exchange <sup>112</sup> therefor, gave its check, already, by its procurement, certified by the Fidelity National Bank." The fact that when the check was thus given it had already been certified by the procurement of the plaintiff in error would in itself preclude the idea that the bank had procured it to be certified. Moreover, the rule requiring checks offered after half past one o'clock in payment of drafts to be certified was not an invariable one, but its enforcement was dependent upon whether the party receiving a check was satisfied that it was good, or that the party drawing it was responsible.

If the check on the Fidelity National Bank had been uncertified it would not be contended that it was taken in absolute and final discharge and satisfaction of the sight draft. It would rather be deemed to have been taken in payment on the condition that it should be paid when presented. An uncertified check, if given in the ordinary course of business, and unattended by special circumstances, is not presumed to

be received as absolute payment, even if the drawer have funds in the bank. The holder is not bound by receiving it, but may treat it as a nullity if he derives no benefit from it, provided he has been guilty of no negligence which has caused an injury to the drawer: 2 Parsons on Contracts, 8th ed., 736. The payee to whom the debt is owing may demand money in lieu of a check, in the absence of an express agreement. No implication arises from the mere fact that the drawer has procured the check to be certified, that it is accepted as money or currency. The rule has been laid down in New York that by the act of certification the bank undertakes for only two facts, viz: The genuineness of the drawer's signature, and the sufficiency of his account to meet the demand of <sup>118</sup> payment; that it vouches for nothing further, either in the body of the check or indorsed upon it: *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67; 17 Am. Rep. 305. While the act of certification may increase the negotiability of the check in the market it cannot be regarded as evidence of the solvency of the bank, and, *per se*, gives rise to no presumption that a check is accepted in payment as money. It was said in *Born v. First Nat. Bank*, 123 Ind. 78, 18 Am. St. Rep. 312: "It neither represents nor touches the question of the solvency of the bank upon which it is drawn. There is, therefore, no just reason for concluding that the party who takes a certified check, in the ordinary course of business, assumes the risk of the solvency of the bank chosen by the drawer of the check as his place of deposit. . . . The certification of a check is not intended to convey to the person to whom it is offered an assurance that the bank upon which it is drawn is solvent, for there is nothing in the nature of the transaction, nor in the form of the contract, which authorizes the inference that any of the parties expected or intended that it should have that effect."

The question of the drawer's liability on a check, procured by him to be certified before delivering it to the payee, has received the consideration of the supreme court of Massachusetts in the cases of *Head v. Hornblower* and *Minot v. Russ*, 156 Mass. 458; 32 Am. St. Rep. 472. In the opinion by Field, C. J., a marked distinction is drawn between checks presented for certification by the drawer and those whose certification is procured by the payee or holder. It was there held that, when the payee or holder of a check presents it for certification, the bank knows that it is done for

the convenience or security of the holder. The holder <sup>114</sup> could demand payment if he chose, and it is only because instead of payment the holder desires certification that the bank certifies the check instead of paying it. In the opinion it is said: "The weight of authority is, that if the drawer, in his own behalf, or for his own benefit, gets his check certified, and then delivers it to the payee, the drawer is not discharged; but that if the payee or holder, in his own behalf, or for his own benefit, gets it certified instead of getting it paid, then the drawer is discharged. We are of the opinion that this view of the law rests on sound reasons. . . . If persons receive checks uncertified, and then present them to the bank for certification instead of payment, the certification should be considered as discharging the drawer."

A check being payable immediately on demand, the holder has no right to demand from the bank any thing but payment of the check; and the bank has no right, as against the drawer, to do any thing else but pay it: *Daniell on Negotiable Instruments*, sec. 1601. Where, therefore, the holder, instead of demanding and receiving the money, has the check certified, and leaves the money in the bank subject to future draft, he enters into independent contractual relations with the bank not contemplated by the drawer, and to which the drawer is not a party. Instead of receiving payment, as he might and should have done, he chooses to accept in place of payment an express executory agreement by the bank to pay the check to the holder when presented for payment at any time thereafter: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403. In contemplation and by operation of law the holder is in the position of having actually drawn out the funds from the bank, and redeposited them to his <sup>115</sup> own credit, and caused a certificate of deposit to be issued to him therefor. It is evident that the drawer is thereby made to stand in a different relation to the payee and holder from what he would were the check certified by his own procurement prior to its delivery to the payee.

We find no error in the record that would justify a reversal of the judgment of the court below, and the judgment of the circuit court is therefore affirmed.

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**BANKS—CHECKS—EFFECT OF CERTIFICATION BEFORE DELIVERY.**—When the drawer of a check procures its certification by the bank before its delivery to the drawee the drawer is liable upon nonpayment on presentation

to the bank: *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634; 31 Am. St. Rep. 403, and note. If a drawer in his own behalf or for his own benefit gets his check certified, and then delivers it to the payee, the payer is not discharged, but if the payee or holder, in his own behalf, gets it certified instead of getting it paid, then the drawer is discharged: *Minot v. Russ*, 156 Mass. 458; 32 Am. St. Rep. 472, and note. The certification of a check by the drawee at the request of the indorser, before delivery to the holder, does not release the indorser: *Mutual Nat. Bank v. Rotgé*, 23 La. Ann. 933; 26 Am. Rep. 126. See further on this subject, to the same effect as the foregoing cases: *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St. Rep. 312, and note.

**PAYMENT—CERTIFIED CHECK AS.**—Where the holder of a check procures it to be certified this operates as payment of the debt for which the check was drawn, and the drawer is released from liability: *French v. Irwin*, 4 Baxt. 401; 27 Am. Rep. 769. To make the acceptance of a certified check operate as an absolute payment there must be an agreement, express or implied, that it shall be regarded as money: *Born v. First Nat. Bank*, 123 Ind. 78; 18 Am. St. Rep. 312, and note. See the extended note to *Lineweaver v. Slagle*, 54 Am. Rep. 781, 782.

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## ROTH v. STATE.

[51 OHIO STATE, 209.]

**STATUTES—GAME LAWS, CONSTRUCTION OF AS TO GAME KILLED BEYOND THE STATE.**—A statute making it unlawful to purchase, sell, expose for sale, or have in possession any of the birds mentioned therein, but declaring that its provisions shall not be construed to apply to any common carrier into whose possession any of the birds or game shall come in the regular course of their business while in transit to the state from any place without the state where the killing of such birds or game shall be lawful, applies to game killed beyond the state, and makes the sale or the having in possession such game in this state unlawful.

**CONSTITUTIONAL LAW—GAME LAWS.**—A statute making it criminal for a person to have in his possession or to purchase or sell certain game birds or animals at the times designated therein is constitutional, though applicable to birds or animals killed outside of the state where such killing was unlawful.

**PROSECUTION** against the defendant, a hotel-keeper, for having in his possession, for the purpose of sale to his guests in the city of Cincinnati, six quail. These were purchased in the state of New York and shipped thence to him. He had sold one of the quail, not in the original package, to a guest at his hotel. The killing of the quail in New York was lawful. The defendant was found guilty and sentenced to pay a fine, and an appeal was taken to the court of common pleas from a justice of the peace before whom the prosecution was instituted, and his judgment affirmed. Another appeal



was taken to the circuit court, resulting in another affirmance, and thence the case was brought to the supreme court by writ of error.

*W. K. Maxwell*, for the plaintiff in error.

*J. K. Richards*, attorney general, and *John P. Murphy*, for the defendant in error.

<sup>210</sup> The Court. The prosecution was based on section 6964 of the Revised Statutes, as amended April 6, 1882 (79 Ohio Laws, 74), which reads as follows:

"Whoever purchases, sells, exposes for sale, or has in his possession any of the birds, game, or animals mentioned in sections 6960, 6961, and 6963, during the time when the killing thereof is made penal, shall be fined not exceeding twenty-five dollars nor less than two dollars, or imprisoned not more than thirty days, or both; *provided*, that the provisions of this act shall not be construed as applicable to any common carrier into whose possession any of the birds, game, or animals herein mentioned shall come in the regular course of their business for transportation, whilst they are in transit through this state from any place without this state, where the killing of said birds, game, or animals shall be lawful."

<sup>211</sup> Section 6961 provides that: "No person shall, on any place, catch, kill, or injure, or pursue with such intent, any quail, except between the tenth day of November and the fifteenth day of December, inclusive." This section also prohibits the catching, killing, or injuring of other kinds of birds, game, or animals, within certain designated periods, and prescribes penalties for the infraction of any of its provisions.

The claim of the plaintiff in error is, that it is not a violation of section 6964 to sell, or expose for sale, quail, or other game, which was not caught or killed in this state, during the prohibited season; and, as it is shown by the agreed statement of facts, that the quail sold by him was killed in the state of New York when it was there lawful to do so, he was guilty of no offense, and should have been discharged. We do not adopt that interpretation of the section. Its terms do not restrict the offenses defined by it to the purchase, sale, exposure for sale, or having possession of birds, game, or animals which were caught or killed in this state, or such as were caught or killed in violation of the sections therein specified. By its language it is made unlawful to purchase,

sell, or expose for sale, or have the possession of, "during the time when the killing thereof is made penal," any of the birds, game, or animals mentioned in those sections, without regard to where or when the same were caught or killed; the essential fact being their possession, sale, or exposure for sale, during the season when it is unlawful to kill them. And that such was the legislative intention is manifest from the proviso contained in the section, which exempts from its penalty common carriers who have received such <sup>212</sup> game outside of the state where it was lawfully killed, and have it in their possession in the state in the course of transportation through it, in the regular course of their business. If such possession was lawful without the proviso its provisions were unnecessary, and are inoperative. But, the possession of such game in this state, though received from another state where it was lawfully killed, having been made an offense by the preceding clause of the section, the proviso became necessary for the protection of common carriers under the circumstances therein stated, and accomplishes that result. As none but such carriers are entitled to that protection the possession by others here during the prohibited season of game lawfully killed outside of the state is a violation of section 6964, and its sale, or exposure for sale, within that period, is likewise an offense under it. We cannot say that a statute of that kind will not be more effectual in preserving birds and game in this state than one preventing the sale of such only as should be killed here. Nor do we think the statute is unconstitutional. Every one is presumed to know the law, and persons who acquire such property when the statute is in force take it subject to its provisions: *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140; *Magner v. People*, 97 Ill. 320; *State v. Randolph*, 1 Mo. App. 15.

Judgment affirmed.

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STATUTES.—GAME AND FISH CAUGHT IN ANOTHER STATE, the sale of may be prohibited: Extended note to *Ex parte Maier*, 42 Am. St. Rep. 141. The question as to the constitutionality and validity of game laws in general will be found fully treated in the same note.

**BOICE v. HODGE.**

[51 OHIO STATE, 236.]

**CORPORATIONS—STOCKHOLDER'S LIABILITY.**—UPON THE RENEWAL OR EXTENSION of the time of payment of a debt by a corporation a stockholder's liability continues, though he has before such renewal or extension parted with his stock.

ACTION against stockholders to enforce their liability for indebtedness of the corporation. The defendants proved that the debts upon which the action was brought were either contracted after they had ceased to be stockholders, or though contracted before, had been renewed afterward without their consent. The trial court held that their liability nevertheless continued. The constitutional and statutory provisions referred to in the opinion of the court were as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable over and above the stock by him or her owned on any amount unpaid thereon, to the further sum of at least equal in amount to such stock": Const. 1851, art. 13, sec. 3. "The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable in addition to their stock in an amount equal to the stock by them subscribed, or otherwise acquired to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation": Ohio Rev. Stats. 1892, art. 58, sec. 32.

*Swayne, Swayne & Hayes*, for the plaintiff in error.

*Baker, Smith & Baker, and E. W. Tolerton*, for the defendants in error.

237 **BRADBURY, J.** The only question arising upon the voluminous record in this cause, which we deem of sufficient general interest to consider, is that growing out of the refusal of the circuit court to relieve the plaintiff in error from liability on account of debts of the company created while he was a stockholder, the time for the payment of which had been extended, by renewals, after he had disposed of his stock. If a holder of the stock of a corporation is a surety merely in his relation to the corporate debts, and his liability is to be measured by the rules of law which govern that 238 relation, then an extension by a creditor of the time for the

payment of a corporate debt, by its renewal after a stockholder had ceased to be such, and without his consent, would relieve him from liability for its payment: *Slagle v. Pow*, 41 Ohio St. 603; *Bank of Steubenville v. Leavitt*, 5 Ohio, 207.

That the liability of a stockholder for the corporate debts in this state is secondary—that is, cannot be resorted to by the corporation creditors until the corporate assets are exhausted, or cannot be reached by the ordinary processes of law—was established by the case of *Wright v. McCormack*, 17 Ohio St. 86.

This, however, is not a test of the question, for in many cases, in fact usually, the creditor may pursue the principal debtor and his surety, contemporaneously, or even pursue the surety in the first instance, under some circumstances: *Wilkins v. Ohio Nat. Bank*, 31 Ohio St. 565; Brandt on Suretyship, sec. 97.

The liability of the stockholders is founded upon section 3 of article 13 of the constitution of 1851, and section 3258 of the Revised Statutes. The subject was of sufficient importance to have thus secured the attention of the convention that framed our present constitution, and, we think that in view of this constitutional provision, and the legislation founded upon it, the principle of holding stockholders of corporations liable for corporate debts is within the public policy of the state, and that the statute should be construed so as to constitute it a substantial provision for the benefit of the corporate creditors.

One who contracts with a corporation may be presumed to have kept these beneficial provisions in mind at the time. It was his privilege to inquire<sup>239</sup> and ascertain who then constituted the corporate body, and investigate their pecuniary responsibility. To require him, however, at his peril, to examine his books every time he may be invoked to renew an existing debt, and ascertain if changes in the corporate membership have occurred since the debt was created, and if so, investigate the comparative pecuniary ability of the new, as compared with that of the old, stockholder, would seem to us a long stride in the direction of nullifying by construction these constitutional and statutory provisions which, at best, involve much difficulty and delay in their application. The question has received the attention of the courts of a number of the states: *Harger v. McCullough*, 2 Denio, 119; *Hanson v. Donkersley*, 37 Mich. 184; *Jackson v. Meek*, 87

Tenn. 69; 10 Am. St. Rep. 620; and incidentally touched in some other cases. The decisions have been conflicting.

In *Wheeler v. Faurot*, 37 Ohio St. 28, and *Harpold v. Stobart*, 46 Ohio St. 397, 15 Am. St. Rep. 618, this court recognized the conflict among the authorities upon the question, but did not find it necessary to determine it. In *Taylor v. Wheel Co.*, 9 Am. Law Rec. 28, the court of common pleas of Logan county held that the extension of a corporate debt by a renewal did not discharge a stockholder who was liable as such for the original debt, but who had transferred his stock before the time for payment had been extended, by a renewal of the note. This rule, we think, is in harmony with the spirit of the constitutional and statutory provisions of this state prescribing the liability.

Judgment affirmed.

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**CORPORATIONS. — LIABILITY OF STOCKHOLDER FOR CORPORATE DEBT** when the corporation becomes insolvent after his transfer of his stock: Extended notes to *Freeland v. McCullough*, 43 Am. Dec. 698, and *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 861. The creditor of a corporation who gives up old notes and takes new ones after a stockholder has withdrawn from the corporation by making a sale of his stock and giving due public notice thereof thereby releases such stockholder from the debt: *New England etc. Bank v. Newport Steam Factory*, 6 R. I. 154; 75 Am. Dec. 688.

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## INSURANCE COMPANY v. HULL.

[51 OHIO STATE, 270.]

- CONTRACT. — AN ILLEGAL AGREEMENT MADE BY A PLAINTIFF** will not defeat him unless his cause of action is founded upon, or arises out of, such agreement.
- CONTRACT, ILLEGAL, NO RESCISSION NECESSARY.** — If an assured compromises his claim and accepts a less sum than that due, in consideration of the promise of the insurer not to prosecute the former on a charge of burning the property insured, the consideration is illegal and the compromise void, and the assured, without any rescission, may maintain an action upon his policy as though such compromise had not been effected.
- CONTRACT, ILLEGAL AGREEMENT AS A DEFENSE.** — If a claim against an insurer is compromised upon the consideration that he will not prosecute the assured upon a charge of burning the property such compromise is illegal, will not be enforced at the instance of the assured, and constitutes no impediment to an action upon the original policy.
- CONTRACT, AGREEMENT NOT TO PROSECUTE A CRIMINAL CHARGE.** — To render a contract void, on the ground that its consideration was the suppression of a prosecution, the crime charged need not have been committed.

**RESCISSION — CONSIDERATION, RETURN OF WHEN NOT NECESSARY.** — If a person entitled to recover the value of property insured and afterward destroyed by fire makes an agreement of compromise under which he receives a less sum than is due, and such compromise is as against him fraudulent or otherwise illegal and nonenforceable, he may maintain an action against the insurer upon the original liability without first returning the money received under the compromise, because he is entitled to the sum so received, whether the compromise is valid or invalid.

**CONTRACT, ILLEGAL, RETAINING CONSIDERATION.** — If a contract is void, because resting upon an illegal consideration, its repudiation by one party does not give the other the right to have restored to him what he parted with under it, nor does the retaining by the party of what he has received amount to a ratification of such contract by him. An illegal contract is not susceptible of ratification.

*Hine & Clarke and Thomas Bates*, for the plaintiff in error.

*R. B. Murray, T. W. Sanderson, and C. R. Truesdale*, for the defendants in error.

**270 WILLIAMS, J.** The record discloses that on the trial the plaintiff gave evidence sustaining the **277** allegations of her petition, and the only defense attempted to be maintained was that which pleaded the compromise, in support of which, and of the averments of the reply thereto, the parties respectively offered their proof. The court instructed the jury, in substance, that, if the parties made a compromise and settlement of the plaintiff's loss, by which she accepted five hundred and seventy-five dollars in satisfaction of her claim, and a promise that she should not be prosecuted on the charge of burning the property formed no part of the consideration, she could not recover; but, if such promise was a part of the consideration, the contract was void and constituted no defense to the action. To the last proposition the defendant excepted, and whether that part of the charge was erroneous or not is one of the questions in the case.

It is not disputed that a contract founded upon a consideration which, in whole or in part, is illegal, immoral, or against public policy, is void, and will not be enforced at the instance of any party to it; but it is contended that rule cannot avail the plaintiff, because the contract of compromise was executed by the payment of the sum agreed upon and the surrender of the policy, and was, therefore, notwithstanding its infirmity, a bar to the action. We think not. The rule is, that the court will not assist either party to such a contract to enforce it against the other, or to recover what he

has parted with under the contract; and the test in determining when it applies to a plaintiff is whether his cause of action is founded on or arises out of the legal agreement. If the action is of that character, whether it appear from his own stating or is shown by way of defense, he must <sup>278</sup> fail; otherwise, not. The plaintiff's action was upon the policy of insurance, which, it was admitted, was issued by the defendant and was without taint or blemish. The destruction of the property insured was total, so that, under our statute, the amount owing to the plaintiff was fixed and certain, being the amount for which the policy was in force when the fire occurred: Rev. Stats., sec. 8643; *Insurance Co. v. Leslie*, 47 Ohio St. 409. The petition, to which a copy of the policy is attached, contains all the allegations necessary to entitle the plaintiff to recover upon it, and on proof of those that were denied, to the satisfaction of the jury, the plaintiff was entitled to a verdict, unless the alleged compromise agreement set up in the answer should be established and enforced against her. Her cause of action was not founded on, nor did it arise out of, that agreement. She predicated no claim upon it, nor in any way sought its enforcement, or the recovery of any thing she had parted with under it. On the contrary, the defendant set it up by way of defense and sought to make it effectual against the plaintiff, who controverted its validity on the ground that it was illegal and had been obtained by duress. We see no reason why the plaintiff might not pursue that course. She was not obliged to first bring an action to set aside the agreement and compel the return of the policy wrongfully obtained from her, or set out in her petition the facts contained in the answer and reply; they were not a part of her case. The agreement was a matter of defense, which might or might not be pleaded; and the necessity of pleading it, as well as the burden of proving it, was on the defendant: <sup>279</sup> *Larimore v. Wells*, 29 Ohio St. 13. The plaintiff was not required to anticipate the defense and assail the agreement, in the petition; and when set up in the answer it was none the less open to attack by her than it would have been if made the foundation of an action against her; nor, when attacked, can it be more effective in the one case than in the other. The party asserting it in either way, as the ground of a right which he is seeking to enforce, must be defeated, because of its illegal character. "An instrument may be shown to be

void and without legal existence or efficacy, as for want of consideration, or for fraud, or duress, or incapacity of the parties, or any illegality in the agreement": 2 Parsons on Contracts, 8th ed., 670. And this is so whether the instrument be pleaded as a cause of action or as a defense to an action not arising out of the agreement. In the cases of *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759, and *Raguet v. Roll*, 7 Ohio, 76, the actions were upon instruments given for an unlawful purpose; in the former case on promissory notes, and in the latter on a mortgage executed to secure the notes, which were given for the sole consideration that a criminal prosecution against one of the makers should be suppressed. In each of the cases the plaintiff failed because his cause of action was founded upon the illegal contract. The plaintiff in the case of *Meare v. Adams*, 8 Ohio, 372, 32 Am. Dec. 723, sought to have a deed executed by him set aside on the ground that it was made in consideration that he should not be prosecuted for an alleged crime, of which the grantee accused him. The illegal character of the agreement and the plaintiff's connection with it were alleged in his bill, and constituted the only ground for the relief he prayed for; and it was held that no relief could be <sup>280</sup> granted him on such a cause of action. Upon the same principle the plaintiff, in *Thomas v. Cronias*, 16 Ohio, 54, and in *Kahn v. Walton*, 46 Ohio St. 195, were denied the remedy sought in those cases. And in *Hooker v. De Palos*, 28 Ohio St. 251, which was an action to recover back money paid in part performance of an illegal agreement, the plaintiff was defeated on the same ground. In all of these cases, and others of like character, where the plaintiff failed to obtain the relief he desired, his cause of action was founded upon, or arose out of, the illegal transaction; and in that important and decisive feature the case before us is distinguished from them.

It was held in *James v. Roberts*, 18 Ohio, 548, that a court of chancery will restrain the collection of a note and mortgage procured by threats of a groundless prosecution. The court, in distinguishing that case from *Roll v. Raguet*, 4 Ohio, 400, 22 Am. Dec. 759, say, that in the latter "Raguet agreed that he would not only not prosecute, but would use his influence to prevent a prosecution, and that he would not appear as a witness against the accused." The doctrine of the *Roll* case is recognized, but, in holding that it did not apply to the *James* case, the court say: "That *James* was



entirely innocent of the crime charged against him, and that was known to all parties concerned; that the charge was got up merely for the purpose of extorting money from him by operating upon his fears, and that, fearing the consequences of the prosecution, notwithstanding his innocence, he executed the note and mortgage." And further, that "a true public policy requires that all groundless prosecutions should, if possible, be prevented, and that every facility shall be afforded to the innocent to escape from <sup>281</sup> such a calamity; and we think an innocent party may, with great propriety, ask to be relieved from the consequences of a groundless charge." While this case does not overrule that of *Moore v. Adams*, 8 Ohio, 372, 32 Am. Dec. 723, or even refer to it, we regard it as containing important qualifications of the doctrine of that case, which are sustained by well-considered adjudications elsewhere; among them, *Heckman v. Swartz*, 50 Wis. 267; *Atkinson v. Denby*, 6 Hurl. & N. 778; 7 Hurl. & N. 903; 30 L. J. 361; *Hullhorst v. Scharner*, 15 Neb. 57. A party who, in the free exercise of his faculties, enters into an unlawful agreement does not stand in precisely the same position as one who executes such a contract under duress. There is no contract without the consent of the parties to its terms, and there is no consent when the free agency of one party is overcome; and it can be of no practical consequence whether it be overcome through fear of loss of life or of limb, or through fear of imprisonment. The latter may be as potent as either of the others, and, with some individuals, more so. Nor can we think a sound rule requires that the threat of either should, in all cases, be such as would operate upon persons of ordinary firmness, and inspire in them a just fear. The question in each case must be whether the person threatened was deprived of his freedom of will; and that is a question of fact in the determination of which regard should be had to the nature of the threats, the sex, age, and condition of life of the party, and the attending circumstances. In the proper application of the rule to the case made by the record before us we are not prepared to say the jury was not authorized to find that the agreement relied on as a defense was procured from the plaintiff by duress, and therefore void. In that event she was <sup>282</sup> not in *pari delicto*, and, under the authority of *James v. Roberts*, 18 Ohio, 548, might, if necessary, have maintained an action to set it aside. But, as has already been shown,

that was unnecessary; the plaintiff might, as she did, resist the agreement on the ground that it was illegal, when set up in defense to her action.

Another objection made to that part of the charge we have been considering is, that it was misleading, in that it implied the plaintiff was guilty of arson, and, in effect, required the jury to find in her favor notwithstanding she burned the property. The charge will not bear that construction. To render the contract void on the ground that its consideration was the suppression of a prosecution, the crime charged need not in fact have been committed. It was not pleaded as a defense, that the plaintiff burned the property, nor does that claim appear to have been made, in any way, on the trial. The fact that no such defense was made may be regarded as an admission in the case that there was no foundation for it; and, though that may have inured to the plaintiff's advantage, it is not probable that the jury was misled, as counsel for plaintiff in error suppose. And again, it is said, there was no evidence in the case to which the charge was applicable. We have examined the evidence, and think it was sufficient to authorize the charge given.

The only other question deemed of sufficient importance to be noticed in the report arises out of the refusal of the court to give to the jury an instruction requested by the defendant, the substance of which is, that the plaintiff could not recover because she had not paid or tendered back the money received under the alleged compromise agreement. It is contended that a party who <sup>283</sup> would rescind a contract must restore to the other what has been received from him; and such is undoubtedly the general rule. It is not, however, without exceptions, one of which is found in the case of *Bebout v. Bodle*, 38 Ohio St. 500, in which this court held that "where a principal debtor, by falsely and fraudulently representing to the creditor that his surety has consented to an extension of time for payment, procures from the creditor an agreement for such extension in consideration that interest be paid, such agreement is, as to the creditor, fraudulent, and he may, upon discovery of such fraud, even after the period of extension has expired, repudiate such agreement and sue upon the original contract without refunding or tendering back the interest paid under such invalid agreement." In the opinion of the court by Longworth, J., it is said: "It is further urged that, in order to enable plain-

tiff to repudiate the contract, she was bound to refund to William the money paid as its consideration, or at least to tender it back. This cannot be true. This sum, which was the interest covering the period of extension, during which the principal remained actually unpaid, was due to the plaintiff from William, irrespective of the question whether the agreement was valid or invalid. We can see no reason why plaintiff should be compelled to pay to this defendant money which was her own in either event, and to which he could not, in any aspect of the case, be entitled."

The principle of that case, applied to this one, rendered it unnecessary for the plaintiff to return to the defendant the five hundred and seventy-five dollars she had received before commencing her action. The property insured having been totally destroyed, the sum due <sup>284</sup> on the policy was, under the provisions of our statute heretofore referred to, as certainly fixed at the amount for which the policy was in force when the fire occurred as if it had been evidenced by the company's note; and she was, therefore, when she brought her action, entitled to receive from the defendant, in the absence of any valid defense, the sum of eleven hundred and eighty-five dollars. No defense was made except that based on the alleged compromise under which, it is conceded, she was entitled to the sum paid her; and, with that defense determined in her favor, a much larger sum was justly due her, so that the sum paid was owing to her in any event, and no good reason appears why it should have been returned to the defendant. The plaintiff credited the amount on the policy, and sued for the balance, thus giving the defendant the full benefit of it, which was equivalent to its restoration: *Allerton v. Allerton*, 50 N. Y. 670. Besides, the contract being void because resting upon an illegal consideration, its repudiation by one party does not give the other a right to have restored to him what he parted with under it; nor does the retaining by the party of what he has received amount to a ratification of the contract by him. Such contracts, having no validity from the beginning, are capable of receiving none by any ratification, however deliberately and formally made; for any attempted ratification must necessarily be as ineffectual as the original contract, because as illegal. The law does not recognize it to be the right of parties to contracts of that nature to either have them enforced or have a return of what has been parted with in their performance;

graph company upon his land without compensation to him, or without an agreement between him and such corporation, if you find this corporation did so enter, was not a rightful entry or occupancy; and, as to the trees growing upon this land at the time such company constructed its lines, as between him and such corporation he had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company. The United States could not, nor has it attempted to, take away by any statute that right. Mr. Taylor's right to maintain the trees in the ordinary way was an absolute right, and this right could be <sup>354</sup> taken from him in no way until such time as they acquired the right to maintain such lines by prescription, which means actual occupancy for twenty-one years or more, or by appropriation or agreement; and for this company, by its agents, without first acquiring the right, to enter upon this land and to cut the trees growing thereon, would be proceeding without lawful authority."

If this instruction is wrong the conviction cannot stand.

It is maintained by the plaintiffs in error that the charge is erroneous because The Postal Telegraph Cable Company derived authority by force of section 3454, and following, of the Revised Statutes of Ohio, and of section 5263, and following, of the Revised Statutes of the United States (by which its line is made an instrument of interstate commerce), to enter upon and occupy the highway for its telegraph line, and was therefore rightfully there for the purposes of its business, and that as it appears that what was done by the employees of the company in the way of trimming the trees of Mr. Taylor was done to prevent the branches from interfering with the operation of the telegraph line, their acts could not be in violation of any right of Mr. Taylor, inasmuch as he could not be possessed of any right to intrude, by growing trees or otherwise, upon the right of occupancy and use thus acquired and enjoyed by the company. Such acts would not be, within the meaning of our criminal statute, wrongful, nor could the land, as respects the company thus rightfully in occupancy of the highway, be esteemed the land of another within the meaning of section 6880.

<sup>355</sup> The sections of the Ohio statutes cited give authority to any magnetic telegraph company to construct telegraph lines from point to point along and upon any of the public

roads and highways, etc., etc., but the same shall not incommode the public in the use of such highway. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or by appropriation, for the purpose of making preliminary examinations and surveys, with the view to the location of lines of magnetic telegraph, and may appropriate so much thereof as may be deemed necessary for the erection and maintenance of its poles, piers, abutments, wires, and other necessary fixtures, and for stations, and the right of way over such lands and adjacent lands sufficient to enable it to construct and repair its lines. But no such company shall, without the consent of the owner thereof in writing, enter any building or edifice, or use or appropriate any part thereof, or erect any telegraph-pole, pier, or abutment in any yard, or in any inclosure within which an edifice is situate, nor erect any telegraph-pole, pier, abutment, wires, or other fixtures so near to any edifice as to occasion injury thereto, or risk of injury in case such pole, pier, or abutment be overthrown, nor injure, or destroy any fruit or ornamental tree.

The sections of the United States statutes cited give to any telegraph company organized under the laws of any state the right to construct, maintain, and operate lines of telegraph over and along any of the military or post roads of the United States, but the lines must not interfere with the ordinary travel on such roads; and before any company can exercise any of the powers or privileges <sup>350</sup> conferred, such company shall file its written acceptance with the postmaster general of the restrictions and obligations required by law. A later section declares: "That all public roads and highways, while kept up and maintained as such, are hereby declared to be post routes."

It is apparent that the only limitation expressed upon the right to maintain lines of telegraph upon the public highways is that they shall be so constructed as not to interfere with the public use of the highway. But the statute nowhere undertakes to deal with the private right of ownership in the highways, and the question arises whether it was the legislative purpose to give rights to telegraph companies inconsistent with the rights of the owner of adjoining lands in the highways.

Whatever may be the rule in other states, we have supposed

that the question of the right in the highway of a landowner whose title extends to the center of the road is not an open one in Ohio. The question has been the subject of adjudication in a score of cases decided by this court, notably in the following: *Bingham v. Doane*, 9 Ohio, 167; *Crawford v. Delaware*, 7 Ohio St. 459; *Cincinnati etc. Ry. Co. v. Cummins*, 14 Ohio St. 523; *Hatch v. Cincinnati etc. R. R. Co.*, 18 Ohio St. 123; *McClelland v. Miller*, 28 Ohio St. 502; *Lawrence R. R. Co. v. Williams*, 35 Ohio St. 168; *Railroad Co. v. O'Harra*, 48 Ohio St. 343. Perhaps the principle is not better stated than in *Lawrence R. R. Co. v. Williams*, 35 Ohio St. 168, opinion by Gilmore, C. J., as follows:

"As between the public and the owner of land upon which a common highway is established it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. <sup>357</sup> The right to improve includes the power to grade, bridge, gravel, or plank the road in such a manner as to make it most convenient and safe for use by the public, for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man and beast, and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and, when the use or easement in the public ceases, it reverts to him free from incumbrance.

"In the exercise of the right of eminent domain the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along and upon a public highway. . . . In such case the rights of the public and the rights of the owner are entirely distinct; and the consent, expressed or implied, of one to the appropriation would not bind or affect the rights of the other. . . . The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use, to which the highway has been diverted, imposes burdens on the land that are entirely different from,

and in addition to, those that were imposed by the highway. The right to so divert the use and impose additional burdens on the land could only be acquired <sup>358</sup> by the corporation by agreement with the owner, or by appropriating and making compensation therefor, in the mode prescribed by law."

Applying the doctrine of this holding to the case at bar it is manifest that the learned trial judge did not err in his charge bearing upon the property right of Mr. Taylor in the highway, but that, on the contrary, the law upon that subject was correctly stated to the jury. And, if right upon that point, the result would seem to follow, as further charged by the judge, that the landowner "had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company." The rule of law rests upon the clear ground that the appropriation of the public highways for the purpose of telegraph lines was a new use. The highways were originally dedicated for the purposes of public travel, and not for the purpose of telegraph lines. Hence the new use imposed an additional burden. The statutes of Ohio grant to telegraph companies secondary and subordinate, rather than co-ordinate, rights, with travelers, which fact is apparent in the provision that the lines are to be so constructed as not to interfere with the public use of the highways: *Cincinnati etc. Ry. Co. v. Telegraph Assn.*, 48 Ohio St. 390; 29 Am. St. Rep. 559. The presence in the statute of provision for the protection of private rights where lines are built on private lands, and the absence of such provision where the highways are used, is strong indication, as it seems to us, that the purpose was to avoid any interference with the rights of the adjoining landowners. And the conclusion seems inevitable, taking the language of the entire statute upon the subject, that, whatever <sup>359</sup> grant of right in the highways is given telegraph companies as against the public, no right is attempted to be given them as against individuals. The question of legislative power, therefore, to authorize a telegraph company to take the interest of the adjoining landowner in the highway without compensation, need not be considered.

It follows that, before the telegraph company could possess a right in such measure as to interfere with the right of the landowner in the highway, it would be required to acquire

that right in some one of the ways known to the law. It is not pretended that any such method has been resorted to. Hence, the entry upon the land by the company was, as to such right, not a rightful entry. There was no error, therefore, in the trial judge giving the instruction upon that subject already quoted.

The court also said to the jury "that in doing these acts, if these men in good faith honestly thought from the circumstances that they had the right to cut the trees as they did, they could not, within the meaning of the law, be held to be guilty of a crime in this case, even though they had no right or lawful authority so to do; however, if you find they acted heedlessly, recklessly and carelessly, without honestly believing they had the right to do it, then, as to this branch of the case, they would be liable." And this is assigned as error, because, as is urged, if the defendants honestly, though mistakenly, believed they had a right to cut the trees, the question of recklessness would not enter into the consideration, and they could not be guilty. We see no error in this instruction to the jury. Indeed it is probably more favorable to the defendants than they could well ask. If, with the <sup>see</sup> information from Mr. Taylor as to his ownership of the land and of the trees, and in the face of his protest, they chose to go on and do the injury complained of, it was for the jury to say whether or not they acted "heedlessly, recklessly, and carelessly," and, if they did so act, then the cutting was "wrongful," within the meaning of the statutes. That the cutting, if it injured the trees, would inflict pecuniary injury on Mr. Taylor was apparent on the face of things. The trees were of value to the enjoyment of the property. Not only as a matter of sentiment on the part of the owner who had planted them and had watched their growth for nearly half a century, but as an improvement which added money value to the farm, had Mr. Taylor an interest in preserving them from injury, and in invoking the aid of the criminal law, where the superior force of the telegraph company made it impracticable for him to personally protect his own. That, too, was the time for him to stand for his own. The right in the company, if it existed, to set poles as near as one hundred and thirty feet from one another, with cross-arms six feet in length, and to put upon them fourteen wires, implied the right to place the poles as near together as the company might desire, and to put on them cross-arms of any length,



and string a corresponding number of wires. And, if there was the right to cut branches where necessary to the working of the line, there would arise an equal right to cut down the trees themselves in case a like necessity appeared. The land-owner made resistance so soon as his property rights were directly assailed, but he did not resist any too soon.

<sup>261</sup> It is contended that the claim of the telegraph company to lawful possession as an instrument of interstate commerce is sustained by the holding of the supreme court in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1. In that case it is held that the powers conferred upon Congress to regulate commerce among the several states, and to establish postoffices and post-roads, are not confined to the instrumentalities of commerce, or of the postal service known or in use when the constitution was adopted, but keep pace with the progress of the country, and were intended for the government of the business to which they relate at all times and under all circumstances, and it is the duty of Congress to take care that intercourse among the states and the transmission of intelligence are not obstructed or unnecessarily incumbered by state legislation. And further, that the act of July 24, 1866 (sec. 5263, et seq.), which declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that, a telegraph company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the states, and is not limited in its operation to such military and post roads as are upon the public domain. And, as conclusion, that the statute of Florida, so far as it grants to the Pensacola company the exclusive right of establishing and maintaining lines of electric telegraph as therein specified, is in conflict with that act, and therefore inoperative as against a corporation of another state entitled to the privileges which that act confers; and further, that a telegraph company of another <sup>262</sup> state, which has secured the right of way by private arrangement with the owner of the land, and duly accepted the restrictions and obligations required by that act, cannot be excluded by the Pensacola company.

But this is very far from holding that a telegraph company which accepts the terms of the United States statute thereby acquires any right as against the individual property right

of the citizen. True, the holding is that the telegraph is an instrument of interstate commerce; that telegraph companies are subject to the regulating powers of Congress, in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. But how does this advance the argument? It is made plain, we think, by what has preceded, that the state cannot grant to a railroad company any right in a public highway which invades the individual right of the owner of adjoining land; such right may be acquired by due process of law; it cannot be legally seized by brute force. It is to be noted also, that the Western Union company whose right is vindicated by the decision cited, "has secured a right of way by private arrangement with the owner of the land," and hence the property rights of the citizen were in no way involved in the case. So solicitous, however, was the eminent jurist who wrote the opinion (Chief Justice Waite) that no unwarranted impression should be created, that he took pains to guard against it, when speaking of the statute, by use of the following language: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and <sup>and</sup> erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." . . . "No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the constitution is not interfered with. Only national privileges are granted."

It is manifest that the case is not an authority supporting the contention of the plaintiff in error.

Beyond this it is urged that, by not resisting the erection of the poles and the stringing of the wires when the line was placed along the highway some ten years before, Mr. Taylor is, in some way, estopped from now asserting his private rights, and hence it could not be made a criminal offense to

invade those rights. *Goodin v. Cincinnati etc. Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95, is cited in support of this contention. The doctrine of the Goodin case was held in *Cleveland etc. R. R. Co. v. Robbins*, 35 Ohio St. 483, to "rest upon its own peculiar facts, and is not to be extended," and in the recent case of *Railroad Co. v. Perkins*, 49 Ohio St. 331, it is again observed, respecting the same case, that "What is there said must be confined to the facts of that case." If, however, the doctrine of the Goodin case be at all applicable to the facts of the case at <sup>364</sup> bar, it would only prevent a proceeding on the part of the landowner to compel a removal of the line. It could not work a transfer of the right of the landowner in the road to the telegraph company. That result, by reason of mere acquiescence, could not be accomplished short of twenty-one years. The private right, therefore, would not be extinguished, and if not extinguished, that property right was still susceptible of protection by the criminal law. But, aside from this, even if the Goodin case applies here, why should the landowner be estopped? The holding in the Goodin case proceeds upon the theory that the owners must have been fully aware of the appropriation proceedings, and that their property was being seized and despoiled, and upon the additional fact that large sums had been expended on the faith of their apparent acquiescence. In the case at bar it is not shown that at the time of the erection of the telegraph line the danger of interference with, or injury to, private property was apparent, nor that expense has been incurred relying upon apparent acquiescence, nor, indeed, that any large sum has been expended at all.

Our conclusion is that the owner of the adjoining land was the owner of the trees, and had the right to their full enjoyment subject only to the convenience of public travel; that his property in the trees was a legitimate subject of protection by state legislation, and that the criminal arm of the law was properly invoked for his protection.

Other questions are argued, but we find none presented by the record of sufficient gravity to justify the use of time and space in their discussion.

Judgment affirmed.

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**TELEGRAPH COMPANIES—LINE ON HIGHWAY AS ADDITIONAL SERVITUDE—COMPENSATION TO ABUTTING OWNERS.**—The erection of a telegraph line upon a highway is an additional servitude for which compensation must be made to the owner of the fee, and the legislature has no power to authorize

the imposition of such servitude except on condition that due compensation shall be made to the owner of lands covered by such highway: *Western Union Tel. Co. v. Williams*, 86 Va. 696; 19 Am. St. Rep. 908, and note; *Stowers v. Postal Telegraph etc. Co.*, 68 Mo. 559; 24 Am. St. Rep. 290, and note. This question is thoroughly treated in the monographic note to *Cheapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 229.

## BOARD OF EDUCATION v. STATE.

[51 OHIO STATE, 581.]

**TAXATION, LIMITATION UPON POWER OF.**—The legislative power to impose taxes is subject to the limitation that it shall not be so employed as to take the property of one or of a number of persons and grant it as a benevolence to another.

**TAXATION.**—THE AUTHORITY TO IMPOSE TAXES IS IN ITS NATURE LEGISLATIVE, but is subject to the power of the courts to determine in particular cases whether the extreme boundary of legislative power has been reached and passed.

**TAXATION TO PAY UNFOUNDED CLAIM.**—A FINDING BY A LEGISLATURE in a statute that a claim exists in favor of an individual and against a board of education of a township, accompanied by a direction that taxes be levied to meet it, is not conclusive upon the board, and it may therefore resist the levy of such taxes on the ground that the claim assumed by the legislature to exist was neither a legal nor a moral obligation against the city.

**CONSTITUTIONAL LAW.**—LEGISLATIVE DETERMINATION THAT AN OBLIGATION EXISTS AGAINST A MUNICIPALITY, such, for instance, as a board of education of a township, is not conclusive, and, though the legislature has directed that taxes be levied to discharge such assumed obligation, the municipality may resort to the courts and there prove that no legal or equitable obligation existed against it, and for that reason refuse to levy the taxes so authorized.

**APPLICATION** for a writ of mandamus to compel the levying of a tax pursuant to an act of the legislature of the state. This act directed the board of education, at its regular meeting after the passage of the act, to levy a tax for the purpose of refunding to a former treasurer of the township the sum specified in the statute with interest, and which it declared had by such treasurer been paid over to his successor in office by mistake. In the petition for the writ the relator averred that he had been treasurer of the township of Marion, and, as such, ex-officio treasurer of the school fund; that a warrant had been issued to one William Clark for the sum of one hundred and ninety-seven dollars and seventy-six cents (being the amount specified in the act of the legislature); that this warrant was payable out of the school fund of the township, and had been by the relator so paid; that,

on his settlement with the county auditor, he was unable to find the warrant in question, and had, therefore, paid over the whole amount shown to be in his hands without taking such warrant into account; that subsequently he had found the warrant and had presented it to the proper authorities and demanded payment, but that the sum so paid by him remained unpaid. The board of education answered that the warrant relied upon by the relator had been issued by mistake and without authority, and, though it had come to the possession of the relator in some manner, he had never in fact paid it. The defendant therefore insisted that it was neither legally, equitably, nor morally bound to pay the latter the amount of such warrant or any sum whatsoever. A demurrer having been interposed to the answer it was sustained, and a writ of mandate directed to issue, and an appeal was taken to the higher court.

*Hidy, Patton, Marchant & Nye Gregg*, for the plaintiff in error.

*John Logan and Gardner & Rogers*, for the defendant in error.

537 BRADBURY, J. The answer of the respondent, if true, shows that the demand of the relator has no foundation, whatever, in fact or justice; that the board of education was under no obligation, legal or moral, to pay the same, and that the fund to be raised by virtue of the act of the general assembly differed in no essential particular from a mere gratuity provided for his benefit. The demurrer admits the truth of the averments of the answer. In such a state of things the act must be held invalid, unless the general assembly has authority to command a local subdivision of the state to raise by taxation a fund for the benefit of an individual to whom it is under no obligation whatever, or, where in such case a dispute exists, the enacting of a statute wherein the facts are declared to be as contended by the claimant, is to be taken to be a legislative determination of the dispute in his favor, binding upon the parties, so that the alleged debtor will be estopped from contesting the existence of the disputed facts in the courts of justice. If either of these alternatives is true there is no constitutional limitation on the power of the legislature to levy exactions on the public as a whole, or on subdivisions of it for political or governmental purposes, for the benefit of favored individuals.

528 It may be true that the responsibility the individual members of the legislature are under to their constituents, or their sense of public duty is a sufficient guaranty against any great injustice in this direction, and, therefore, that unlimited power of taxation vested in that body would not be followed by vicious results generally, though it might be in exceptional instances. However this might be, we, in the present inquiry, are more concerned in determining whether such unlimited power does exist than in the question of the wisdom and expediency of granting it.

Whatever power of taxation resides in the general assembly does so as an incident of the general legislative authority delegated to that body by section 1 of article 2 of the constitution of 1851; this court holding, in *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521, that the provisions of article 12 of that instrument, though they relate to finance and taxation, are limitations upon, rather than grants of, power of taxation; and this, too, although section 4 of this statute expressly requires the general assembly to provide revenue to defray the yearly expenses of the state and pay the interest of its public debt. The power of taxation vested in the general assembly would have been just the same without as with this section.

That the authority to impose taxes is in its nature legislative is established by the uniform current of judicial opinion: *Cass Tp. v. Dillon*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608; *State v. Wilkesville Tp.*, 20 Ohio St. 288; *State v. Richland Tp.*, 20 Ohio St. 362; *State v. Circleville*, 20 Ohio St. 362; 25 Am. & Eng. Ency. of Law, 1871; Cooley on Taxation, 41-53.

529 That the legislative branch of the government is necessarily clothed with a broad discretion in determining the character, whether public or private, of the purpose for which funds may be raised by taxation is equally well settled: Cooley on Taxation, 43; 25 Am. & Eng. Ency. of Law, 72; Cooley's Constitutional Limitations, 599.

In doubtful cases the courts should not interfere with the exercise of this legislative discretion, and in all cases the legislative determination is entitled to great respect: *Hanson v. Vernon*, 27 Iowa, 28; 1 Am. Rep. 215; *Brodhead v. Milwaukee*, 19 Wis. 624; 88 Am. Dec. 711; 25 Am. & Eng. Ency. of Law, 89, 90. That the power, however, is not unlimited is, we think, clearly established by the great weight of au-

thority as well as of reason: *State v. Commissioners*, 35 Ohio St. 468.

The power of taxation is given to the general assembly as an indispensable means of providing for the public welfare; government could not be carried on without such power, and the power should be commensurate with the objects to be attained; but no good reason can be assigned for vesting it with power to take portions, large or small, of the property of one or a number of persons, and granting it as a benevolence to another. Where a legislature attempts this, directly or indirectly, it passes beyond the bounds of its authority, and the parties injured may appeal to the courts for protection. The same constitution which grants the power of taxation to the general assembly recognizes the sanctity of private property, and declares that the courts shall be open for the redress of injuries.

This limitation on the legislative power of taxation is generally recognized by the authorities. <sup>540</sup> The rule, supported by a long array of adjudicated cases, is laid down in 25 American and English Encyclopædia of Law, 74, as follows: "It is within the province of the courts, however, to determine in particular cases whether the extreme boundary of legislative power has been reached and passed." In *Weisner v. Village of Douglas*, 64 N. Y. 99, 21 Am. Rep. 586, Folger, J., says: "But to tax A and the others to raise money to pay over to B is only a way of taking their property for that purpose. If A may of right resist this, as surely he may, how is he to make resistance effective and peaceable save through the courts, which are set to be his guardians? How may the courts guard and aid him, unless they have the power, upon his complaint, to examine into the legislative act, and to determine whether the extreme boundary of legislative power has been reached and passed?"

It may be conceded that the general assembly may authorize one of the political subdivisions of the state to levy a tax to pay a demand not legally enforceable, but founded upon a moral consideration, or may even command that the levy shall be made for that purpose, and yet deny to it the power to determine conclusively the existence of such obligation.

On the other hand, it may be contended that, if the power to levy a tax for a private purpose is denied to it, it follows as a corollary that it had no power to determine the character of a demand, for, if it had the latter power, it could defeat

the limitation by falsely finding the claim to be founded, at least, on a moral consideration. We do not think the conclusion follows, for that would be to impute bad faith to a co-ordinate branch of the government, which is not permissible.

<sup>541</sup> We think, however, that, whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter, the controversy falls within the province of the judiciary. We do not deny the power of the general assembly to inquire into the merits of any claim sought to be asserted through its agency, before granting relief to the claimant by legislative action. Not only has it such authority, but its exercise should be carefully and rigidly observed.

Such investigation, subsequent determination, and resulting action, however, do not estop the parties from appealing to those judicial tribunals of the country that have been established under our constitution and by it vested with the judicial power of the state, and by our laws provided with an appropriate procedure to conduct such inquiries: Cooley's Constitutional Limitations, 115, and cases cited; 3 Am. & Eng. Ency. of Law, 681.

If, in the case under consideration, the relator has paid out money for the benefit of the respondent, for which, by some mistake, accident, or error, he has never received credit it is morally bound to make it good, and this moral obligation is sufficient to support the statute in question: *Lewis v. McElvain*, 16 Ohio, 355; *Trustees v. McCaughy*, 2 Ohio St. 152; *Burgett v. Norris*, 25 Ohio St. 308; *Rairden v. Holden*, 15 Ohio St. 207; *Cass Tp. v. Dillon*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608; *Board of Education v. McLandsborough*, 36 Ohio St. 227; 38 Am. Rep. 582; Cooley on Taxation, 127, 128; *State v. Richland Tp.*, 20 Ohio St. 362; *State v. Hoffman*, 35 Ohio St. 435; *Warder v. Commissioners.*, 38 Ohio St. 643; Cooley's Constitutional Limitations, 283. Where, however, the <sup>542</sup> facts, out of which a moral (or legal) obligation is claimed to arise are disputed, the contention falls within the province of the courts, under the distribution of governmental powers prescribed by our constitution: Const. 1851, art. 4, sec. 1.

Judgment reversed and cause remanded, with instructions to overrule the demurrer to the answer of the respondents.

WILLIAMS, J., not sitting.



**TAXES—POWER OF LEGISLATURE TO IMPOSE.**—The power of taxation and of apportioning taxes is vested exclusively in the legislature unless limited or restrained by some constitutional provision: *People v. Mayor*, 4 N. Y. 419; 55 Am. Dec. 286, and extended note at page 287; *Anderson v. Kerns Draining Co.*, 14 Ind. 199; 77 Am. Dec. 63; *Hill v. Higdon*, 5 Ohio St. 243; 67 Am. Dec. 289. Taxation is a legislative right and duty which must be exercised by the legislature or under the authority of laws passed by them: *Sharpless v. Mayor*, 21 Pa. St. 147; 59 Am. Dec. 759, and note. See, also, the extended notes to *New Orleans v. Great Southern Telephone etc. Co.*, 8 Am. St. Rep. 508, and *Kelly v. Pittsburgh*, 27 Am. Rep. 640.

**TAXES—PAYING CLAIMS NOT STRICTLY LEGAL.**—The legislature may impose a tax for the payment of claims not strictly legal, but founded in justice and equity in the largest sense of those terms, or in gratitude or charity: Extended note to *New Orleans v. Great Southern Telephone etc. Co.*, 8 Am. St. Rep. 511.

**TAXATION.—EXERCISING RIGHT IN FAVOR OF INDIVIDUALS:** See the extended note to *Lowell v. Boston*, 15 Am. Rep. 56.

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CASES  
IN THE  
SUPREME COURT  
OF  
OREGON.

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PENNOYER *v.* WILLIS.

[26 OREGON, 1.]

**AGENCY—WHEN NOTICE TO AGENT WILL BIND PRINCIPAL.**—As to third parties, notice to an agent while acting within the scope of his authority is notice to the principal; but it must relate to the business or transaction as to which the agent is authorized to act.

**AGENCY—FALSE REPORT TO PRINCIPAL—TWO AGENTS OF COMMON PRINCIPAL—SHIFTING LIABILITY—KNOWLEDGE.**—If a state board of commissioners, being authorized to lend the school fund, appoints an agent to examine and certify as to the title of land offered as security for a loan, the board has a right to rely upon such agent's certificate as decisive of the status of the property. If the certificate is false, thereby causing a loss to the board, such agent cannot exonerate himself from liability by showing that, when the certificate was made, he informed another agent of the board, whose duty it was to act as custodian of funds and securities offered, and to pay over moneys when directed by the board, of the true status of the property, unless the latter agent was afterward intrusted by the board with the duty of examining such title, subsequent to such certificate, and during the performance of which he had in mind or remembered the information previously given him by the agent who made the certificate. If no such duty was imposed upon the latter agent the certifying agent is liable for the loss, although the other agent may have known of the defect in the title.

**AGENCY—WHEN KNOWLEDGE OF AGENT IS NOT BINDING ON PRINCIPAL.** If a state board of commissioners, being authorized to lend the school fund, has an agent whose duty it is to act merely as custodian of the funds and securities offered for loans, but who has no discretion in the matter of making loans, or passing on the sufficiency of titles, he is not such an agent as that previous notice to him of an incumbrance on land offered as security for a loan of funds in the agent's hands will be notice to his principal.

**AGENCY—WHEN KNOWLEDGE OF AGENT IS BINDING ON PRINCIPAL.**—If a state board of commissioners, being authorized to lend the school fund, has an agent to whom is confided the duty of examining the title to

land offered as security for a loan, subsequent to the board's acceptance of the offer, to see that no change has occurred, and he is invested with discretion to withhold the money if he learns of any defect in the security offered, and, after direction from the board to make the loan, knowledge of an outstanding incumbrance is present in his mind, whether acquired before or during his agency, such knowledge is binding on the principal.

**AGENCY—KNOWLEDGE OF AGENT AS NOTICE TO PRINCIPAL—EVIDENCE.**—If a state board of commissioners, being authorized to lend the school fund, has one agent to examine and certify as to title of land offered as security for a loan, and another to act as custodian of funds and securities offered for loans, and to pay over money when a loan is approved by the board, and the former agent makes a false certificate whereby loss occurs, evidence as to whether the latter person was such an agent as that his knowledge, at the time of the loan, and before the money was paid, of the existence of an incumbrance on the property, was notice to the board, and that it was, therefore, not misled by the false certificate, is competent, and should not be excluded.

**ACTION** by Pennoyer and others who constituted the state board of land commissioners for the sale of school and university lands against Willis, to recover two thousand eight hundred and seventy-three dollars and forty-eight cents damages in consequence of defendant's negligence in certifying to the title of real property offered as security for a loan from the state school fund. The power to loan the school fund and to determine the sufficiency of the security offered was by law vested solely in the plaintiffs, and they alone assumed to exercise such power. It was for them to determine in all cases whether or not a loan should be made. The board adopted certain rules and regulations in reference to lending the school funds of the state. As a matter of convenience to the board and to the public the several county treasurers of the state were made depositaries of the funds, and custodians of the securities. Local agents were appointed whose duty it was to advise the board, from time to time, as to the condition of the various securities in the county for which they were appointed. The security required for a loan was unincumbered real estate, worth three times the value of the loan desired, exclusive of perishable improvements. W. N. Moore, treasurer of Douglas county, was one of the custodians of the school fund, and in February, 1884, Joseph Roberts applied to him in writing for a loan of two thousand dollars, offering as security certain lands in Douglas county. This application was referred to the local agent, the defendant, Willis, to have the title examined, who certified that the land was free from all liens and

incumbrances with the exception of a mortgage by D. W. Nerney, Jr., to the school board of six hundred dollars, and that he believed it to be of the value of six thousand dollars, excluding perishable improvements. This certificate, however, was false, because, at the time, the property was subject to the lien of a mortgage of twenty-eight thousand dollars to S. Marks & Co., of record in that county, and of which the defendant had knowledge and notice. On February 12, 1884, the application and certificate were presented to the board of commissioners with an indorsement by Moore, recommending the loan as a desirable one, approving the security offered as ample, and stating that he had on hand sufficient school funds to meet the loan, if ordered. The board approved the application and directed Moore to advance the money applied for to Roberts. Moore did so without consulting Willis, and, without having the Marks mortgage satisfied. This mortgage and the mortgage to the board were foreclosed, and, upon a sale of the mortgaged premises under a decree in favor of the board, and against Roberts, two hundred dollars was realized upon the amount loaned, and the amount sued for was lost to plaintiffs. Roberts was completely insolvent. Testimony was given tending to show that, when Roberts applied for the loan, he went to the county treasurer, who made out his application; that the two went together to the defendant's office to have the title to the property examined; that Friedlander, one of the mortgagees of the Marks mortgage, went with them; that Willis examined the title and found the Nerney and Marks mortgages; that Friedlander told him that the Marks mortgage had been paid, and would be satisfied of record before Roberts' application could be returned from Salem, and that, relying upon these representations, Willis did not enter the Marks mortgage in the certificate, but told Moore not to advance any money to Roberts until the Marks mortgage had been satisfied; that, when the state board approved the loan, Roberts and wife executed their note and mortgage, and Moore paid over the money without consulting Willis, or informing him that the application had been approved; that Willis had no knowledge of the execution of the Roberts mortgage until a long time thereafter; that, while the certificate was not true, it was not fraudulent or made with any intent to deceive any one; and that Willis acted upon the honest belief that the Marks mortgage had been fully paid and would be satisfied

on the record. Evidence was offered by the defendant tending to show that, with the exception of examining and certifying to the title and value of land offered as security, and the approval of applications, the whole matter of making loans in Douglas county was intrusted to Moore as stated in the opinion; that defendant had no other duty with respect to loans than to examine and certify to the title and value of land offered as security, when requested by Moore; and that, after the Roberts application had been returned to Moore, and while in the discharge of the duty intrusted to him, Moore had in mind the Marks mortgage. This evidence was all excluded, and the court instructed the jury that the issue made by the pleadings as to Moore's agency was immaterial. This action of the court, as to the exclusion of the evidence offered, and so instructing the jury, was assigned as error.

*A. M. Crawford and William R. Willis*, for the appellant.

*George E. Chamberlain*, attorney general, *J. W. Hamilton*, and *J. C. Fullerton*, for the respondents.

¶ **BEAN, J.** The contention for the defendant is that the evidence offered and excluded tended to show that Moore was such an agent of the plaintiffs as that his knowledge at the time the loan was made of the existence of the Marks & Co. mortgage was notice to the plaintiffs, and, as a consequence, they were not misled by his certificate, but had knowledge through their agent, of the existence of the outstanding incumbrance before they parted with the money. <sup>a</sup> It must be conceded that, in order to recover in this action, plaintiffs must show, not only that defendant's certificate was false, but that, relying thereon, and without knowledge of its falsity, they were induced to and did part with the money. If, before the loan was consummated and the money paid over to Roberts, they had knowledge of the Marks & Co. mortgage, either directly or through some authorized agent, and, notwithstanding such knowledge, parted with the money, they cannot hold the defendant liable for the loss, although his certificate may have been false. It becomes important, therefore, to consider whether the evidence excluded tended to show that Moore's relation to the plaintiffs was such that they would be chargeable with the knowledge he possessed at the time he consummated the loan and paid over the money, of the Marks & Co. mortgage. It is a familiar and well-settled

rule that, as to third parties, notice to an agent while acting within the scope of his authority is notice to the principal. But it is equally as well settled that such notice, in order to bind the principal, must relate to the business or transaction in reference to which the agent is authorized to act for and on behalf of his principal, and to matters over which his authority extends: Story on Agency, sec. 118; Mechem on Agency, sec. 718. If it relates to a matter over which the agent has no authority, and concerning which he is not authorized to act for his principal, although he may be an agent for other purposes, it will not affect the principal or be binding on him: *Congar v. Chicago etc. Ry. Co.*, 24 Wis. 157; 1 Am. Rep. 164; *Roach v. Karr*, 18 Kan. 529; 26 Am. Rep. 788. This rule is generally said to be based upon the theory that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject matter of his agency, and material to his principal's protection. Such notice, in order to bind the principal, must, therefore, come to an agent who has authority \* to act or deal in reference to those matters which the knowledge or notice affects, and which, upon grounds of public policy, it is presumed he has communicated to his principal. Now, in view of the rules of the board prescribing the duties of the defendant and of Moore, it is clear that Moore was not such an agent at the time defendant's certificate was made, as that notice to him of the Marks & Co. mortgage would operate to relieve the defendant from liability for the negligent or unfaithful discharge of his duty. Moore was a mere custodian of the fund, holding it subject to the order of the board, with no power or authority to determine whether or not a loan should be made, or to contract one, or to pass upon the title or sufficiency of the security offered, nor was he an agent to whom the board looked for information on these subjects, and such matters were not within the scope of his employment. The power to loan the school fund, and determine the sufficiency of the security offered, was by law vested solely in the plaintiffs, and they alone assumed to exercise such power. It was for them to determine in all cases whether or not a loan should be made. As a matter of convenience to the board and to the public, Moore, as county treasurer, was made a depository of a portion of the school funds, and the custodian of the notes and mortgages taken for loans thereof in his county, and authorized to receive payments thereon and pay over

to borrowers the amount applied for when directed by the board.

The defendant's duties were of an entirely different character, requiring in their proper discharge the special knowledge incident to his profession as an attorney, which the treasurer was not expected to have. He was appointed for the purpose of ascertaining and reporting the state and condition of the title of land, and, in assuming to <sup>10</sup> discharge that duty established the relation of principal and agent, or attorney and client, between him and his principal. His representations to the plaintiffs, therefore, were decisive of the status of the Roberts property, so far as they were concerned, and they had a legal right to rely and act upon them in ordering the loan made; and for any neglect or misrepresentations in the performance of his duty in the premises whereby an injury resulted he is responsible. To him alone they looked for information as to the status of the property, and not to any statements or representations of Moore. Nor was Moore under any legal or moral obligation at that time to report to them the condition of the title; his duties and those of the defendant were separate and distinct in relation to their common principal, and each was responsible for the faithful discharge of the particular duties imposed upon him by his employment, and we are aware of no rule of law which can relieve the defendant from liability by showing that, at the time he knowingly made an incorrect statement or report to his principal, he informed some other agent of the same principal, who had no authority to deal with reference to the subject matter of the report, that such statement was not true. And, besides, the rule that the principal is chargeable with what the agent knows is for the benefit of third persons, and is founded upon the theory that the agent is at liberty and is presumed to have communicated such knowledge to the principal, or, if he has not, still, the principal having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal, otherwise the neglect of the agent, whether designed or not, might operate most injuriously to the rights and interests of such party. But it is difficult to perceive what application the rule can have when the understanding between an agent and such party is that the knowledge of the agent is not <sup>11</sup> to be communicated to the principal but to be withheld from him. It is but a fair inference from this

record that it was not intended or expected that Moore should inform the board of the Marks & Co. mortgage, nor was the information imparted to him for that purpose, but only that he might withhold the money until the mortgage should be satisfied of record, in case the loan should be ordered by the plaintiffs. It is clear, therefore, that defendant cannot exonerate himself from liability upon his said certificate by showing that, at the time he made it, he informed Moore of the true status of the property, unless Moore was afterward intrusted by the board with the duty of examining the title to the land offered as security, subsequent to defendant's certificate, and during the performance of which he had in mind or remembered the information previously given him by the defendant.

The law provides that the school fund shall be loaned only on unincumbered property to applicants having a title thereto free from defects, and the board is only authorized to make a loan on real property so circumstanced. It was, therefore, its duty to ascertain that the title was in such condition at the time the loan was made and the money paid over, some three months after the date of defendant's certificate, but if it neglected to do so, such neglect would, of course, not relieve the defendant from liability upon his certificate. In approving the application and ordering the loan it had a right to rely and act upon defendant's certificate as decisive of the status of the property at the time it was made, and if, relying thereon, it simply ordered and directed Moore, who, under its rules, was a mere custodian of the fund, to pay over the money to Roberts, and by reason of defendant's incorrect certificate it was lost, defendant would be liable, although Moore may have known of the outstanding incumbrance. Moore's duties, as prescribed by the rules of <sup>12</sup> the board, were those of a mere custodian or depositary holding the fund subject to the order or direction of the board, and, if he assumed to negotiate a loan, prepared notes and mortgages, or examined titles without any other authority from the board, he was acting without the scope of his employment, and no knowledge concerning the title of land offered as security which he might acquire in so doing would be binding upon the board. But if the board returned the Roberts application to him, and intrusted him with the duty of ascertaining that no change had occurred in the title subsequent to defendant's certificate, he became not only a mere custodian of the fund, but an agent for the purpose of seeing that the title was



in the condition required by law at the time the loan was consummated, and invested with the discretion of withholding the money in case knowledge should come to him of any defect in the security offered. He would not be expected or required to examine the condition of the title prior to the date of defendant's certificate, but if, after the receipt of the order to make the loan, and before paying over the money, knowledge of an outstanding incumbrance was present in his mind, however acquired, it would, under such circumstances, be knowledge possessed by him within the scope of his employment, and with which his principal would be chargeable, whether acquired prior to the commencement of his agency or during the continuance thereof: *Mechem on Agency*, sec. 721; *The Distilled Spirits*, 11 Wall. 356. And if, notwithstanding such knowledge, he paid over the money to Roberts, the defendant is entitled to avail himself of Moore's negligence as a defense, because, in such case, the proximate cause of the loss would be the negligent performance of a duty by another agent, and not his false certificate. Whether Moore was such an agent, or the mere custodian of the fund, as prescribed in the rules, was, under the <sup>13</sup> pleadings, a question for the jury, and could not be taken from them if there was any evidence, however slight, tending to support defendant's contention. The evidence offered and excluded tended to show that the board furnished Moore with blank applications for loans, and blank notes and mortgages; that all applications were received by him, and that, at his request, defendant examined the title and certified to the value of the land; that the applications were made to Moore and forwarded to the board at Salem for its approval, and that it was the custom of the board to return all applications to him without any special instructions, with an order indorsed thereon directing the loan to be made; that he examined the record to see that no transfers had been made or liens acquired subsequent to defendant's certificate; prepared the necessary notes and mortgages, attended to the recording of the same, and paid over the money; indorsed all applications for loans, and signed his reports to the board as "local agent," and continued to act as an agent of the board after he had ceased to be county treasurer; in fact, was the only person through whom the board received applications for loans or with whom it had any communication whatever concerning loans of money in that county. This evidence was competent, it seems to

us, as testimony tending to show that, when the board returned the Roberts application to Moore, it intrusted him with the duty of ascertaining that the title was in the condition required by law before paying the money over, and should have been admitted and the question of his agency submitted to the jury, under proper instruction by the court. The judgment must, therefore, be reversed and a new trial ordered.

Reversed.

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**AGENCY—NOTICE—KNOWLEDGE.**—Notice to an agent of any fact or facts connected with the business in which he is employed is notice to the principal: *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401; *MERCHANTS' Nat. Bank v. Lovitt*, 114 Mo. 519; 35 Am. St. Rep. 770, and note. The knowledge of an agent will affect his principal with notice if acquired by him during his agency, and in the course of the business from which the principal's rights and liabilities arise: Note to *Harris v. Fisher*, 44 Am. St. Rep. 454. The knowledge of an agent will not be imputed to his principal when it was not the duty of the agent to disclose it: See monographic note to *Trentor v. Potchen*, 24 Am. St. Rep. 231, on notice to agent as notice to principal. But notice to an agent is notice to the principal when it comes to the agent in such manner that he may communicate it to his principal, or act upon it without any violation of duty: *Littauer v. Houch*, 92 Mich. 162; 31 Am. St. Rep. 572, and note, showing that the test is, whether the information was of a character which it was the duty of the agent to communicate. The rule that the knowledge of an agent, in order to affect his principal with notice, must be acquired by him during his agency and in the course of the same transaction from which the principal's rights and liabilities arise, has no application to a case where it is clear that the information obtained by the agent in a former transaction was so precise and definite that it must have been present to his mind while engaged in the second transaction, and the agent was at liberty to communicate such information to his principal: *Snyder v. Partridge*, 138 Ill. 173; 32 Am. St. Rep. 130; note to *Harris v. Fisher*, 44 Am. St. Rep. 454. The knowledge of the agent can be charged to the principal only when clear proof is made that the knowledge was present in the agent's mind at the time of the transaction which is the subject of consideration: Note to *Littauer v. Houch*, 31 Am. St. Rep. 574. If an agent has acquired knowledge of a fact so recently as to make it incredible that he should have forgotten it, his principal will be bound, although he did not acquire such knowledge while transacting his principal's business: *Brothers v. Bank of Kaukauna*, 84 Wis. 381; 36 Am. St. Rep. 932, and note. The general rule, however, is that notice to an agent of facts outside the scope of his employment does not bind the principal: *Wittenbrock v. Parker*, 102 Cal. 93; 41 Am. St. Rep. 172. Notice to an agent of the condition of the title to land which he buys for his principal is notice to the principal, whatever the latter's actual knowledge may be on the subject: See monographic note to *Trentor v. Potchen*, 24 Am. St. Rep. 229, where the subject of notice to agent as notice to principal is discussed at length.

## FERCHEN v. ARNDT.

[26 OREGON, 121.]

**TRUST FUNDS—PREFERENCE AMONG CREDITORS.**—A trust creditor cannot obtain a lien or preference over other creditors of an insolvent estate until he makes it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property or the proceeds thereof. The trust fund or its proceeds must be traceable. Hence, the *cestui que trust*, after dissipation of the trust fund, has no longer any remedy in equity to fix a charge upon the estate of such trustee, but must come in and share with the general creditors.

SUIT to establish a preference and a lien upon the assets of the partnership of Arndt & Ferchen in the hands of B. W. Robinson, as receiver for certain moneys alleged to have been received in trust by said firm. The plaintiff and defendant had been partners in the foundry business under the firm name of Arndt & Ferchen. The plaintiff sued for a dissolution and an accounting, and in the interim the property of the partnership was turned over to a receiver. Under order of court the receiver sold the property and paid into court about two thousand dollars for distribution among the creditors of the firm. In the mean time the E. W. Bliss company intervened in the suit, praying to have allowed to it a claim against the partnership for the sum of two thousand one hundred and fourteen dollars, with interest. It sought to have this claim decreed to be a preferred lien on all assets of the partnership, on the ground that the partnership had represented the Bliss company as its agents in the sale of its goods on commission; that the moneys of the Bliss company had been mingled with those of the partnership; and that the moneys of the Bliss company had been used to pay the running expenses of the partnership, to purchase new machinery, to purchase merchandise afterward sold by the partnership, and to pay the wages and salaries of employees. The court afforded the Bliss company an opportunity to show by evidence that its money was in the partnership fund. This it failed to do, and the court held that the amount claimed should be allowed, but denied the preference sought. The Bliss company appealed.

*Wallace McCamant and Zera Snow*, for the appellant.

*Fulton Bros.*, for the respondent.

**126 LORD, J.** The facts show that if the claim of the Bliss company is preferred it will absorb the entire assets of the firm,

leaving nothing for its other creditors. The case is rendered important by the nature of the question involved and the number of other cases dependent upon its decision. Upon the admitted facts there is no pretense that the money derived from the sale of the intervenor's goods forms any part of the fund now awaiting distribution at the hands of the court. It is conceded that the money so collected has been appropriated to the payment of debts, the purchase of stock, and the payment of the running expenses of the partnership, while the firm was conducting its business. But it is claimed that, where an agent or trustee has wrongfully used or appropriated the property or funds of another, it creates an equitable charge upon his whole estate, or a preferred lien upon his assets. This is put on the ground that such estate is thereby increased, or that his assets would have been less but for the wrongful use or appropriation of the trust fund, and consequently that it cannot be supposed that such fund is wholly lost, but that it exists in a substituted form as a part of such estate or assets, although it cannot be pointed out or directly traced. That there may be cases to which such argument is applicable may be conceded, as where the trust fund has gone into and remains in the assets which are sought to be charged, but its force is not preceived where such fund is dissipated, or used in the payment of debts, or the expenses of business.

The equitable right to follow and retake from the possession <sup>137</sup> of a trustee property wrongfully appropriated by him, or from those in privity with him, who are not *bona fide* purchasers for value, so long as it can be traced, whether it remains in its original or in a substituted form, upon the ground that such property, in whatever form, is subject to the trust in favor of the owner, is well established. "Formerly," Mr. Justice Bradley says, "the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held

as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried": *Frelinghuysen v. Nugent*, 36 Fed. Rep. 238. Mr. Pomeroy says: "Equity regards the *cestui que trust*, in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. . . . No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated": 2 Pomeroy's Equity Jurisprudence, sec. 1058. This equitable doctrine is put upon the ground <sup>128</sup> that the real owner has the right to retake and reclaim his property through all its transformations and forms, so long as it may be traced, whether its identity is preserved, or is merged into a mass of which it forms a part. To accomplish this end, when such trust property has been mingled into a mass of which it forms a part, but its identity is lost, equity affords relief by creating a charge or lien upon such mass for its ascertainable value. The right to such relief has its basis in the right of property, and "simply asserts," as Andrews, J., says, "the right of the true owner to his own property": *Cavin v. Gleason*, 105 N. Y. 262. But whether such owner seeks to recover specific property, or to create a lien upon a mass or fund, he must trace such property and show that it belongs to him, or that it has gone into and then remains in the mass which he seeks to impress with a lien or charge. In such cases the question to be determined always is whether the trust property or fund, or the proceeds thereof is traceable into any specific property or fund. Before, therefore, one claiming to be a trust creditor can be entitled to a lien or preference over other creditors he must make it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property or the proceeds thereof.

"If it appears," said Andrews, J., "that trust property has been wrongfully converted by the trustee, and constitutes,

although in a changed form, a part of the assets, it would seem to be equitable and in accordance with the equitable principles that the things into which the trust property has been changed should, if required, be set apart for the trust, or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets": *Cavin v. Gleason*, 105 N. Y. 262. <sup>120</sup> See, also, *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463. Hence, so long as the trust property can be traced and followed into the hands of the debtor his estate is subject to the trust; but when it has been dissipated, and is no longer traceable, there remains nothing to be the subject of the trust, and the equitable right of the *cestui que trust* to follow it fails.

"When trust money," said Allen, J., "becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property the trust ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the *cestui que trust* to follow it fails": *Little v. Chadwick*, 151 Mass. 109. To the same effect are *Englar v. Offutt*, 70 Md. 78; 14 Am. St. Rep. 332; *Thompson's Appeal*, 22 Pa. St. 16; *Columbian Bank's Estate*, 147 Pa. St. 422; *Sherwood v. Milford Bank*, 94 Mich. 78; *National Bank v. Insurance Co.*, 104 U. S. 54; *Peters v. Bain*, 183 U. S. 670; *Union Nat. Bank v. Goetz*, 138 Ill. 127; 32 Am. St. Rep. 119; *Goodell v. Buck*, 67 Me. 514; Story's Equity Jurisprudence, secs. 1258, 1259; 1 Lewin on Trusts, 241. From these authorities we draw the conclusion that when the trust property has been dissipated by the trustee, and forms no part of his estate, the *cestui que trust* has no longer any remedy in equity to fix a charge upon the estate of such trustee, but must come in and share with the general creditors. Nor do we find any thing in *Hallett's Estate*, L. R. 13 Ch. Div. 696, to the contrary. In that case Jessel, M. R., said: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating <sup>120</sup> it altogether there remains nothing to be the subject of the trust; but, so long as the trust property can be traced and followed into

other property into which it has been converted, that remains subject to the trust."

Within the principles announced by these authorities the petitioner is not entitled to relief upon the facts stated in his petition, because it is not shown that the fund paid into the court by the receiver and awaiting distribution includes any of the proceeds of the trust property, or forms any part thereof. The admitted facts show that the moneys derived from the sale of the intervenor's property has been used in the payment of debts, and otherwise dissipated, so that such moneys can no longer be traced, or shown to form any part of the fund which is sought to be charged with a preferred lien. The cases in conflict with this doctrine, and mainly relied upon in support of the intervenor's contention, are *McLeod v. Evans*, 66 Wis. 401; 57 Am. Rep. 287; *Francis v. Evans*, 69 Wis. 115; *Bowers v. Evans*, 71 Wis. 183; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; 20 Am. St. Rep. 442; *Peak v. Elicott*, 30 Kan. 156; 46 Am. Rep. 90; *Harrison v. Smith*, 83 Mo. 216; 53 Am. Rep. 571; *Stoller v. Coates*, 88 Mo. 514; *Smith v. Combs*, 49 N. J. Eq. 420. It is enough to say that none of the Wisconsin cases received the consent of the entire court, and have recently been overruled in *Nonotuck Silk Co. v. Flanders*, 87 Wis. 237. The recent cases of *Slater v. Oriental Mills* (R. I., July 12, 1893), 27 Atl. Rep. 443, and *Shields v. Thomas*, 71 Miss. 260, 42 Am. St. Rep. 458, ably review and criticise the doctrine of the cases cited in support of the contention for the intervenor, and reach conclusions adverse to it. The distinction between funds remaining in the estate, and which go to swell it, and funds which have been dissipated or used in the payments of debts, and do not remain in the estate, is made clear and applied. <sup>131</sup> To the argument that the relation of debtor and creditor does not exist between the trustee and *cestui que trust*, whose property he has wrongfully converted or appropriated, Stiness, J., in *Slater v. Oriental Mills*, 27 Atl. Rep. 443, says: "The fact that the *cestui que trust* has not entered into the relation of debtor and creditor with the trustee does not affect the question. So long as he seeks to recover what he can show to be his own he is in the position of an owner, but when he cannot do this, and seeks to recover payment out of the trustee's general estate, he is in the position of a creditor." Unless, therefore, he can show the specific property claimed is his, or

that the trust fund has gone into and forms a part of the estate he seeks to charge, he is entitled to no lien or preference, but must prove his claim and share with the other creditors. It results from these views that there was no error, and the decree must be affirmed.

Affirmed.

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**RIGHT TO FOLLOW TRUST FUNDS—PREFERENCES.**—*A cestui que trust* has a right to pursue and recover trust funds, until their identity has been lost, or until they have passed into the hands of a *bona fide* purchaser for a valuable consideration without notice: See monographic note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 125-130; *Holmes v. Gilman*, 138 N. Y. 369; 34 Am. St. Rep. 463, and note. If a trustee has converted trust funds into money, and mingled it with his other money, so that it cannot be separated therefrom, the beneficial owner occupies, according to some of the cases, the position of a general creditor of the estate, and cannot follow the trust funds into the hands of an assignee for the benefit of creditors: *Mutual Accident Assn. v. Jacobs*, 141 Ill. 261; 33 Am. St. Rep. 302. Where money delivered to a bank is so mingled, there is no reason why the depositor should be preferred above any other creditor: *Wetherell v. O'Brien*, 140 Ill. 146; 33 Am. St. Rep. 221. On the other hand, if a trustee places the trust fund in a bank, and the bank, knowing its character, mingles it with its own funds, and, after using it in the payment of its debts, becomes insolvent, and assigns for the benefit of creditors, it is held that the beneficiary has a right to recover the trust fund from the assets of the bank in preference to its general creditors, although he fails to present his claim to the assignee for allowance: *Myers v. Board of Education*, 51 Kan. 87; 37 Am. St. Rep. 263. If trust moneys cannot be identified, because they are mingled with the moneys of the trustee, then the beneficiary is entitled to a charge upon the new investment to the extent of the trust money traceable in it: *Springfield Institution etc. v. Copeland*, 160 Mass. 380; 39 Am. St. Rep. 489; and he may follow trust money into a general heap or account, and take so much out: Note to *Union Nat. Bank v. Goetz*, 32 Am. St. Rep. 129; but a *cestui que trust*, who seeks to fix a charge upon a mass, must trace his estate and show that the specific thing claimed is in equity his property, or that his estate has gone into, and remains in, the mass he seeks to charge. Hence, no lien upon, or priority in, money in the hands of a receiver of an insolvent bank can be given for funds deposited therein before the insolvency, by a tax-collector, in the absence of proof that the funds so deposited form any part of the money in the hands of the receiver, either in their original or transmuted form, or as a part of the mass of the assets of the bank; *Shields v. Thomas*, 71 Miss. 260; 42 Am. St. Rep. 458.

**FOLLOWING COMMINGLED TRUST FUNDS.**—The principal case and that of *Sharpe v. Hartman*, 26 Or. 131, and *Muhlenberg v. Northwest Loan etc. Co.*, 26 Or. 132, were all submitted to the court as involving the same legal principle. No opinion was written in *Sharpe v. Hartman*, 26 Or. 131, as the facts of that case brought it within the ruling announced in the principal case, and the opinion in the principal case was supposed to be decisive of *Muhlenberg v. Northwest Loan etc. Co.*, 26 Or. 132; but appellant's counsel, in the latter case, sought by petition for rehearing to escape the effect of the decision in the principal case, by claiming, for the first time, that the plead-



ings in the case showed that the money for which plaintiff claimed a lien, or its proceeds, were in the possession of the trustee bank at the time of its suspension, and constituted a part of the assets in the receiver's hands. The Northwest Loan and Trust Company was a banking corporation doing business in Portland, Oregon. The bank becoming embarrassed, suspended business, and a receiver was appointed. Muhlenberg brought suit to establish a preference or lien upon all the assets of the bank for certain moneys alleged to have been deposited with the bank in trust. The trust was alleged to have grown out of the fact that the plaintiff and three other persons were jointly interested in a certain mortgage which matured shortly before the trust company suspended; that the bank was requested by such persons to pay this mortgage, and that remittances for that purpose were made by drafts on New York and San Francisco; that the trust company was in debt to its correspondents in each of these two cities; and that in consequence thereof the moneys were not applied to the specific purpose intended, but were used by the bank in paying its debts. The moneys were claimed to have been indistinguishably mingled and mixed by the bank with its general funds, and to be incapable of being traced or identified, or followed into any changed form or specific property or fund. The claims of the other parties were assigned to plaintiff, and he sought to have a lien decreed in his favor upon all the assets of the bank in the hands of the receiver for the repayment of said moneys before any of the other creditors received dividends. No actual money was ever received by the trust company or the receiver from the plaintiff or any of his assignors; and the only benefit the trust company got from the remittances was credit for the amounts thereof with its eastern and San Francisco correspondents. The most that could be said was that the amount of the moneys went to pay debts of the trust company. The trust company, at the time it suspended business, was hopelessly insolvent. The trial court decreed the plaintiff a preference and lien upon the assets of the bank for the amount of the money remitted by the plaintiff and his assignors. The bank appealed, the court expressly authorizing the receiver to take the appeal.

This decree was reversed, and the court, in denying a rehearing, said, with reference to the pleadings above mentioned: "This is a highly technical construction of the pleadings, at variance with the whole theory upon which the case was tried, and is manifestly contrary to the facts as disclosed by the testimony." "The money," said the court, "for which plaintiff seeks to enforce a lien was received by the bank prior to June 19, 1893, and was commingled with and used as a part of its general funds in the usual course of its business from that time until its suspension on July 29, 1893; and there is no evidence to show that any part of it or its proceeds were in the possession of the bank at the time of its suspension, or have since come into the hands of the receiver. It is clear, therefore, that upon the facts plaintiff is not entitled to a lien upon any of the assets of the bank in the hands of the receiver, for, as said by Chief Justice Lord in *Ferchen v. Arndt*, 26 Or. 121; *ante*, p. 603: 'Before one claiming to be a trust creditor can be entitled to a lien or preference over other creditors, he must make it appear that the fund or property of the debtor which he seeks to affect with such a lien or preference includes the trust property or proceeds thereof. The answer alleges that the moneys mentioned in the complaint were deposited with the bank to be paid to a debtor of the plaintiff and his assignor on the order of Markle; that, after its receipt, the bank notified Markle of the same, and he thereupon offered to pay it to such debtor, but that he refused to receive it and 'that said

Markle therefore permitted said moneys to remain on deposit with said trust company, where the same were at the time it was forced by financial embarrassment to suspend its business.' It is contended that the portion of the answer quoted is an allegation or admission that the moneys of plaintiff were in the bank either in specie or in some changed form at the time of its suspension, but when construed in connection with the subject matter of the allegation of which it forms a part it was evidently not so intended, but only to aver that the money remained on deposit with the bank in the sense that it stood on the books of the concern to the credit of the plaintiff and his assignors. This seems to us manifest when it is remembered that the complaint alleges, and the answer admits, that the bank placed the moneys of plaintiff 'in its treasury for use in connection with its banking business, and that, having been so placed in the treasury aforesaid, they were paid out in the course of its business affairs as a banking institution. That thereupon the defendant wholly destroyed the identity of plaintiff's said remittance and the identity of the moneys of the other parties paid over to it in trust as aforesaid.' And 'that by reason of the wrongful mingling of the moneys of plaintiff and the other parties aforesaid it is impossible to follow the moneys so paid to the defendant company and that the same are wholly incapable of identification.'

"The complaint seems to have been drawn and the case was tried on the theory that plaintiff could not trace his money or the proceeds thereof into the hands of the receiver. This position is, in our opinion, fully warranted by the record. No allusion is made by appellant in his brief to the alleged admissions of the answer, nor was his contention in this court that he was entitled to a lien because his money or the proceeds thereof were actually in the possession of the receiver, but on the doctrine that (quoting from the brief) 'where funds come into the hands of a trustee impressed with a trust in favor of the principal, and are wrongfully mingled by the trustee with his own funds so as to be incapable of identification, the *cestui que trust* has an equitable lien on all the assets of the defaulting trustee to the amount of the fund so misappropriated.' In our opinion, therefore, there is nothing in the record in this case to exempt it from the rule announced in *Ferchen v. Arndt*, 26 Or. 121, *ante*, p. 603, and applied in *Sharpe v. Hartman*, 26 Or. 131, the facts of which appellant states in this brief are 'substantially identical' with those in the case under consideration." The principal case being thus approved and followed the plaintiff was held to be only a general creditor.

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## FRIESE v. HUMMEL.

[26 OREGON, 145.]

**EQUITY HAS JURISDICTION TO SET ASIDE A FORMER JUDGMENT OR DECREE FOR PERJURY OR FRAUD** only in those cases where the perjury or fraud consists of extrinsic, collateral acts, not examined and determined in the former action.

SUIT by Louise Friese to set aside a former decree rendered by the circuit court and affirmed on appeal in *Hummel v. Friese*, 24 Or. 236, and for a new trial, on account of the alleged perjury of a witness. The only reason alleged for

setting aside the decree was the perjury of the grantor of Hummel, committed in the former trial, and not discovered until after the death of the alleged perjured witness, and after the rendition of the decree in the former suit. A demurrer to the complaint having been sustained on the ground that it did not state a cause of action, and the plaintiff refusing to further plead, a decree was rendered dismissing the suit, from which the plaintiff appealed.

*Frank B. Jolly, Edward Mendenhall, and J. E. Mendenhall,*  
for the appellant.

*Frank A. E. Starr, George E. Chamberlain, and Warren E. Thomas,* for the respondents.

149 Per CURIAM. Did the complaint state sufficient facts to entitle the plaintiff to the equitable relief demanded? is the question involved in this suit. A court of equity may, by an original bill in the nature of a bill of review, set aside a decree obtained by the fraud of the prevailing party, where the acts or conduct constituting such fraud were not involved in the consideration of the merits: 2 Freeman on Judgments, 4th ed., sec. 485. A judgment or decree procured by perjury is doubtless a fraud, and such as would induce equity to grant relief, were it not for the fact that its existence can rarely or never be ascertained otherwise than by trying anew an issue tried in a former proceeding: 2 Freeman on Judgments, 4th ed., sec. 489. Frauds for which a court of equity will set aside a judgment 150 or decree must consist of extrinsic, collateral acts, not involved in the consideration of the merits. The credibility of testimony given on the trial of a cause, bearing upon the issue, is intrinsic, and has been considered in reaching the conclusion sought to be impeached; and the case is not the less tried on its merits, and the judgment is none the less conclusive, by reason of the false testimony produced: *United States v. Flint*, 4 Saw. 42. "Relief," says Allen, J., in *Ross v. Wood*, 70 N. Y. 8, "can only be granted upon some new matter of equity not arising in the former case. Equity will not take cognizance, on the same grounds, of the very point which another court of competent authority in the case has considered and decided." In *Tebbets v. Tilton*, 31 N. H. 273, it was held that fraud in a judgment might be shown by a party when it may be done without showing any participation in the fraud, and where it does not involve a re-examination of the merits of the

case. In *Folsom v. Folsom*, 55 N. H. 78, it was held, in a suit to impeach a decree for fraud, that evidence discovered after the trial, which showed that the decree had been obtained by perjury, was not newly discovered, but cumulative upon the same issues tried before.

In *Pico v. Cohn*, 91 Cal. 129, 25 Am. St. Rep. 159, the facts showed that the plaintiff was over eighty years old, unused to business, and could not speak or understand the English language; that he owned real property of the value of two hundred thousand dollars, upon which there was an incumbrance of sixty-three thousand dollars; that, being pressed for payment, he applied to one B. Cohn for, and obtained a loan of, that amount, to secure the payment of which he executed and delivered an absolute conveyance of all his property; that within two months from the time he received the loan he tendered to Cohn sixty-five thousand dollars and demanded a reconveyance, and upon Cohn's <sup>151</sup> refusal to convey, he commenced an action to recover said property; that during plaintiff's negotiations with Cohn, one Pico Johnson was present, and knew that the transaction was a loan and security, and not a purchase and conveyance absolute, and shortly after the execution of the deed so stated to others; that, relying on Johnson's knowledge of the transaction, and his statements concerning it, plaintiff called him as a witness, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance, and, upon the strength of his evidence, a decree was rendered in favor of the defendant. In a suit brought to set aside this decree it was alleged, in addition to the foregoing facts, that plaintiff had made the discovery that Cohn had paid Johnson two thousand dollars to testify falsely, which sum was placed in the hands of one Forbes, with directions, given in Johnson's presence, to pay it to him if he testified to an absolute sale, and that, immediately after he had so testified, he demanded and received the money. A demurrer to the complaint having been sustained by the lower court the judgment was, upon appeal, affirmed, the court saying: "That a former judgment or decree may be set aside and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled, beyond controversy, that a decree will not be vacated merely because it was obtained by forged documents or per-

fured testimony." The reason assigned in support of this rule is, that causes once tried by a court having jurisdiction of the subject matter and the parties should forever be at rest; that the unsuccessful party ought reasonably to expect, if he had an unscrupulous adversary, that perjured testimony would be offered at the trial, and should be prepared to meet it; and that, having gone into a consideration of the merits, he is estopped by <sup>183</sup> the conclusion of the court: *United States v. Flint*, 4 Saw. 42; Fed. Cas. 15121. The plaintiff, not having alleged sufficient facts to entitle her to the equitable relief demanded, there was no error in sustaining the demurrer: *Cotzhausen v. Kerting*, 29 Fed. Rep. 821, and the decree is therefore affirmed.

Affirmed.

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**EQUITY—POWER TO RELIEVE FROM JUDGMENT OBTAINED BY FRAUD OR PERJURY.**—A judgment or decree will not be set aside or annulled in equity on account of any fraud which is not extrinsic or collateral to the questions examined and determined in the original action: *Pico v. Cohn*, 91 Cal. 129; 25 Am. St. Rep. 159, and monographic note thereto on relief from judgments obtained by perjury.

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## ALLEN v. LEAVENS.

[26 OREGON, 164.]

**BILL OF EXCHANGE, WHAT IS NOT.**—A promise by one person to another to accept a third person's order for a given amount, with the latter's name indorsed thereon, is not a bill of exchange. There is no liability if the order is never drawn; and, if the promise is to pay such third person's debt, the promisor is not liable to the promisee, as the promise does not express a consideration.

**ACTION** by Allen against Leavens to recover money. The case was tried by the court without a jury, and the court made the following findings of fact: 1. That on November 28, 1892, James Cusick was an employee of Leavens, and that wages were due him; 2. That, at that time, it was verbally mutually agreed, between the plaintiff, defendant, and Cusick, that, in consideration of the plaintiff selling to Cusick certain goods for the sum of twenty dollars and extending to him credit for the same, the defendant would pay the plaintiff on December 12, 1892, twenty dollars out of Cusick's wages, to be deducted therefrom; 3. That, in consideration of said agreement, the plaintiff, on or about November 28, 1892, sold and delivered to Cusick goods valued at twenty dollars,

and extended credit to him for the same; 4. That defendant, on November 28, 1892, made a memorandum in writing offering to accept and pay Cusick's order for twenty dollars on December 12, 1892; 5. That thereafter Cusick indorsed his name on said memorandum, and on December 12, 1892, the plaintiff demanded payment of defendant, but it was refused; 6. That the amount with interest was due, etc. As conclusions of law the court found that said amount was due, etc., and that plaintiff was entitled to judgment. Defendant appealed.

*William W. Page*, for the appellant.

*William L. Nutting*, for the respondent.

167 MOORE, J. There being no bill of exceptions the only question presented is whether the findings support the judgment? The defendant contends that the cause of action is founded upon a bill of exchange alleged to have been drawn on him by James Cusick in plaintiff's favor for twenty dollars, while the plaintiff contends that it is founded upon a promise by defendant to pay Cusick's indebtedness to plaintiff, he being Cusick's debtor in an amount equal to such indebtedness when he made the promise; and that, the defendant's undertaking being original, a memorandum of the transaction was unnecessary. Section 785, Hill's Code, provides that an agreement to answer for the debt of another is void, unless the same or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged. If the defendant was indebted to Cusick, and he to the plaintiff, and all mutually agreed that Cusick's debt should be canceled, and defendant should pay to the plaintiff the debt which he owed to Cusick, such agreement is not within the statute, and is valid and binding without any written memorandum thereof. In such case the defendant's agreement is not collateral, but an original one to pay his own debt to a substituted creditor; and the fact that by the transaction the debt of another is paid makes no difference: Brandt on Suretyship and Guaranty, sec. 66; 3 Parsons on Contracts, 26. The plaintiff in such cases would discharge Cusick's previous liability, and look to the defendant for payment, who, by virtue of the fact of his debt to Cusick, and of the mutual agreement and promise to pay the same to the plaintiff, would become liable therefor. But could this rule have any application to a credit extended by

plaintiff to Cusick subsequent to defendant's promise? It may be conceded that if the plaintiff, upon the faith of defendant's promise, delivered goods to Cusick, but charged the same and extended the <sup>188</sup> credit to the defendant, it was a sale to the latter upon his request, and hence not within the statute; but if the credit were given to Cusick upon the defendant's promise, the latter's undertaking would be collateral, and to render it valid there should be a note or memorandum thereof expressing the consideration: *Dixon v. Frazee*, 1 E. D. Smith, 32; *Briggs v. Evans*, 1 E. D. Smith, 192. If Cusick was at all liable to the plaintiff, the defendant's agreement, though it may have induced the plaintiff to furnish the goods, was collateral, and within the statute: 1 Chitty on Contracts 11th Am. ed., 750. The court found that the plaintiff furnished goods, wares, and merchandise, to Cusick, and extended credit to him, according to the terms of defendant's agreement. The credit having been given to Cusick subsequent to defendant's agreement, Cusick, by the findings of the court, would be liable to the plaintiff, and the defendant's undertaking one of guaranty, collateral to the liability of Cusick.

If the cause of action be as contended for by the plaintiff the findings do not bring it within the rule applicable to the case suggested where an antecedent debt has been discharged in consideration of a mutual agreement of all the parties, and a promise on the part of a third person, who is indebted to the person primarily liable for the original debt, to pay the same; nor can it apply to a credit extended to Cusick subsequent to defendant's promise, because, in that event, it appears from the findings that Cusick was still liable to the plaintiff. If the cause of action be as contended for by the defendant, that the plaintiff, in consideration of defendant's agreement to accept Cusick's order, sold goods, and extended credit to the latter, the defendant would not become liable until Cusick had drawn on him for the amount, assuming, without deciding, that the defendant would be liable notwithstanding the statute, which provides that "No person within this <sup>188</sup> state shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent": Hill's Code, sec. 3194. The court has found that Cusick did not draw the order on the defendant, but merely indorsed his name on the agreement to accept such order when drawn. "A bill of exchange,"

says Mr. Daniell in his work on Negotiable Instruments, section 27, "is an open letter addressed by one person to a second, directing him, in effect, to pay absolutely and at all events a certain sum of money therein named, to a third person, or to any other to whom that third person may order it to be paid"; and Cusick's name indorsed on the defendant's agreement cannot, under the most liberal construction, be deemed to come within the definition above given. From an examination of the court's findings, it would appear, that the sale of the goods had been made upon the faith of defendant's written promise to accept an order to be drawn by Cusick for the amount thereof, and no order having been drawn by him, the defendant has incurred no liability to the plaintiff. For these reasons the judgment is reversed and a new trial ordered.

Reversed.

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**A BILE OF EXCHANGE** is an order in writing directing one person to pay money to a third person: See note to *Harrison v. Nicollett Nat. Bank*, 16 Am. St. Rep. 721.

**PROMISE—CONSIDERATION.**—Any promise to pay, whether in writing or not, must be founded upon a consideration to be binding: *McKenzie v. Puget Sound Nat. Bank*, 9 Wash. 442; 43 Am. St. Rep. 844.

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## THE VICTORIAN, No. 2.

[26 OREGON, 194.]

**ACTIONS—WHEN SEVERAL CAUSES MAY BE JOINED—BOAT LIENS.**—If several causes of action arise under the same statute, are against the same party, triable in the same manner, and can be embodied in one judgment, they may be united in one complaint. Hence, different claims against the same vessel, arising under the boat-lien law, and assigned to plaintiff, may all be sued for in one complaint.

**ASSIGNMENTS.**—A PERFECTED BOAT LIEN MAY BE ASSIGNED like any other debt, and the assignee can enforce it in his own name as if he were the original contractor.

**BOAT LIENS.—INTEREST** may be allowed on the amount of a boat lien from the time the action is commenced to enforce it, and a lien awarded for the entire amount.

**ACTION** to enforce boat liens against The Victorian for materials furnished to a contractor, and by him used in the construction of the boat. The complaint contained three causes of action, but each was for materials so furnished by the plaintiff, except the last, which was for materials furnished by one Moore, which claim had been assigned to plaintiff,



and which was sued upon as assignee. There was a judgment for the plaintiff, and the claimant of the boat appealed.

*William W. Cotton*, for the appellant.

*Charles E. S. Wood, and George H. Williams, Stewart B. Linthicum, and J. Couch Flanders*, for the respondent.

<sup>196</sup> **BEAN, C. J.** This case is similar in many of its facts to the case of *Smith* and others against the defendant boat, commenced July 13, 1891, to enforce a lien for materials sold and furnished *Steffen* between December 12, 1889, and February 26, 1891, and which were used in the construction of the boat in question. In the *Smith* case the constitutionality of the boat lien law, the maritime or nonmaritime character of liens for materials and supplies furnished *Steffen* and used by him in the construction of the boat after it was launched, and the statute of limitations, were all present and decided: *The Victorian*, 24 Or. 121; 41 Am. St. Rep. 838; and although counsel for defendants has reargued these questions with much learning and ability, we are still satisfied with the decision formerly made, and shall regard it as controlling authority. The only questions, then, raised by this appeal, not determined by the *Smith* case are: 1. Can the several causes of action sued on be united in the same complaint; 2. Are the plaintiffs entitled to force *Moore's* lien for materials furnished by him in their name; and 3. Did the court err in allowing as a part of the lien interest in accordance with the agreement between plaintiffs and *Steffen* on the first and second causes of action?

1. We think the first question must be answered in the affirmative. All the causes of action stated in the complaint arose under the same statute, are between the same parties, triable in the same manner, against the same vessel, and can be embodied in one judgment, and hence we are unable to discover any good reason why they should not be united in the same complaint. And, besides, it is very doubtful whether the overruling of a demurrer for the misjoinder of causes of action is ground for the reversal <sup>197</sup> of a judgment or decree unless the defendant has been prejudiced in some substantial manner by such judgment or decree: *Hill's Code*, sec. 104, 230; *Reynolds v. Lincoln*, 71 Cal. 183; *Angell v. Hopkins*, 79 Cal. 181.

2. As to the assignability of mechanics' liens there is much diversity of opinion in the authorities. Mr. Phillips states

the conflicting rules prevailing in the several states as: 1. That the lien is personal, and cannot be assigned; 2. That the proceedings to be taken to enforce the lien must be in the name of the assignor, but subject to this restriction, that the lien is assignable; and 3. That a lien is as assignable as any other debt, and that the proceedings for its enforcement may, if the state law permits, be carried on in the name of the assignee: Phillips on Mechanic's Liens, sec. 54. In *Brown v. Harper*, 4 Or. 89, it was held by this court that the right to perfect a mechanic's lien by filing the notice required by law is a privilege personal to the party performing the labor or furnishing the material, and not assignable; but, after the lien has been perfected by filing the required notice, it then becomes assignable, and can be enforced in the name of the assignee. Under the boat lien law no notice is required to perfect the lien, but it is a proceeding *in rem*, analogous to a suit in admiralty to enforce a maritime lien. It attaches, and is a completed lien by force of the statute from the time the materials are furnished or labor performed, and not, as in case of a mechanic's lien, a mere remedy given by law which secures the preference provided for on condition that the claimant brings himself within the provisions of the statute by a compliance with its terms. If a mechanic's lien is assignable, so that the assignee may sue in his own name after it is perfected, we can conceive of no satisfactory reason why an assignment of a perfected lien under the boat lien law may not be made, so that the assignee can enforce it as if he were the original contractor, whether the proceedings <sup>198</sup> to that end are, under the statute, technically an action at law or a suit in equity. That it is so assignable accords, in our opinion, with the decided weight of authority, the general policy of our law, and the spirit and purpose of the lien law, and can work no injury to the claimant, while the creditor will lose a part of the benefit of his security if he cannot assign it. As was said by Berry, J: "The claim of the materialman and the lien are certainly the property of the materialman, and why should he not have the right to dispose of both? There is nothing in the lien right of the nature of a personal trust. The lienholder is not intrusted with the possession of the property bound by the lien. His lien is a security. What difference can it make to the lienor who holds the lien? His duty is to pay the debt. If he pays it his property is discharged. If he fails to pay it, and

so loses the property, of what moment is it to him whether the lien is enforced by the materialman or his assignee": *Tuttle v. Howe*, 14 Minn. 149; 100 Am. Dec. 205. This view is sustained by the following, among other authorities: Phillips on Mechanics' Liens, sec. 55; Jones on Liens, sec. 1493; Am. & Eng. Ency. of Law, 655; *Lasge v. Bossieux*, 15 Gratt. 83; 76 Am. Dec. 189; *Skyrme v. Occidental Min. etc. Co.*, 8 Nev. 219; *Davis v. Bilsland*, 18 Wall. 659; *Kerr v. Moore*, 54 Miss. 286; *The American Eagle*, 19 Fed. Rep. 879; *The M. Vandercook*, 24 Fed. Rep. 472.

3. From the findings of fact it appears that it was agreed between the plaintiffs and Steffen that the latter should pay interest at the rate of ten per cent per annum upon the purchase price of each installment of materials furnished him, if not paid within sixty days after the date thereof; the court, however, allowed interest only from the time of the commencement of the action. The allowance of this interest is assigned as error. In *Willamette Falls etc. Co. v. Riley*, 1 Or. 183, objection was made to the amount of the judgment because the interest <sup>199</sup> accruing on the demand of plaintiff was included in the judgment, and it was claimed that interest is a nonlienable item of account; but the objection was overruled, and the court held "that interest may be computed on a lienable demand, and a lien awarded for the entire amount," and the same rule was announced and applied in *Forbes v. Willamette Falls etc. Co.*, 19 Or. 61; 20 Am. St. Rep. 793. It follows that the judgment appealed from must be affirmed.

Affirmed.

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SEVERAL SUITS MAY BE CONSOLIDATED where their object is to have the same estate applied to the satisfaction of debts and claims: *Campbell's Case*, 2 Bland, 209; 20 Am. Dec. 360. Courts have the power to consolidate actions, in the absence of any express statutory directions, and upon the motion of either party, in a proper case: *Viele v. Germania Ins. Co.*, 26 Iowa, 9; 96 Am. Dec. 83. Consolidation of actions is the subject of a monographic note to *Logan v. Mechanics' Bank*, 58 Am. Dec. 508-512.

LIENS—ASSIGNMENT—ENFORCEMENT.—A perfected mechanic's lien is assignable: Note to *Mills v. La Verne Land Co.*, 33 Am. St. Rep. 171; *Brown v. School District*, 48 Kan. 709, 712; *O'Connor v. Current River Ry. Co.*, 111 Mo. 185, 192; *McDonald v. Kelly*, 14 R. I. 335; and, as said in the principal case, no satisfactory reason appears why an assignment of a perfected lien under the boat lien law may not be made, so that the assignee can enforce it in his own name. Liens against vessels, and their enforcement, are discussed in the monographic notes to *Keating v. Spink*, 62 Am. Dec. 240; on actions in state courts against vessels: *Scow M. Tuttle v. Buck*, 13 Am. Rep. 273-276.

## WILLAMETTE IRON WORKS v. OREGON RAILWAY & NAVIGATION COMPANY.

[26 OREGON, 224.]

**STREETS—ADDITIONAL SERVITUDE.—AN ABUTTING PROPRIETOR** is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is property, subject, however, to legislative control. Any infringement of this right, caused by the use of the street for other than legitimate street purposes, is a "taking" within the meaning of the constitution. Hence, any structure on a street subversive of its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners for which compensation must be made.

**STREETS—ADDITIONAL SERVITUDE—QUESTION OF FACT.—**Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized.

**STREETS—ADDITIONAL SERVITUDE—ILLUSTRATION.—**An approach to a toll-bridge owned by a private corporation, but not built as a part of or extension of any public highway, composed of a solid structure erected in the middle of a street sixty-six feet wide, which structure is thirty feet wide, extends along the street for some distance in front of an adjoining owner's property, rises to a height of thirteen and a half feet, and leaves a passageway only eight feet wide, is a servitude on the abutting property, for which compensation must be made, although authorized by the legislative and city authorities.

**STREETS—SUBTERFUGE AS TO CHANGE OF STREET GRADE—APPROPRIATION OF STREET TO PRIVATE USE.—**Neither the whole of a public street nor any portion of it can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. It is not a change of grade to construct in a public street a rising approach to a private toll-bridge, which approach is at one point thirteen and a half feet above the street surface.

**EMINENT DOMAIN—COMPENSATION AS CONDITION PRECEDENT—INJUNCTION.** If the statute provides that compensation shall be made as a condition precedent to the taking of private property for public use, an injunction will issue to prevent the use of the property, or to abate its use if already appropriated, until the condition has been complied with.

**EMINENT DOMAIN—MANDATORY INJUNCTION.—**If an easement in a street is taken for public use with the knowledge of, and without objection by, the abutting property owner, but under the assurance that such taking is only intended to be temporary, and the structure constituting the taking afterward becomes permanent and exclusive in character, an injunction to restrain the further use of plaintiff's easement in the street should not be made mandatory until a reasonable time has been allowed in which to acquire his easement by agreement or by condemnation proceedings.

SUIT by an abutting owner to enjoin and restrain the defendant from occupying a portion of the street in front of plaintiff's property with an approach to its bridge across the Willamette river at Portland. Plaintiff's premises were situated on the west side of Third street, which was sixty-six feet wide, and ran northerly to the north line of H street. They were bounded on the north by H street, on the south by G street, and on the west by Fourth street. On that portion of the property abutting on Third street was a two-story brick and iron building, used as a foundry and machine-shop. In 1887 the defendant obtained from the legislature the right to construct and maintain a toll-bridge, with proper and convenient approaches, across the Willamette river. Afterward the city of Portland, by ordinance, granted to the defendant the right to build on Third street "a solid roadway and approach to said bridge from the north line of G street to the center line of H street, said approach to be on an ascending grade from G street, and to be built as a solid construction, not exceeding thirty feet in width." Under this state and municipal authority the defendant, from a point about six hundred feet east of Third street, built a double-decked steel bridge across said river, but not as a part of or extension of any public highway. From the upper deck of the bridge, used for wagon and passenger traffic, the company constructed an elevated roadway, substantially at a right angle with Third street, over and across private property to the east end of H street, where, by a curve, it was connected with an approach in Third street, as provided in the ordinance referred to. This approach was thirty feet wide, and occupied the middle of the street in front of plaintiff's property for about three-fourths of the distance north from G street. It then turned to the east on a curve. At the turn it was about thirty-five feet from the west line of the street, but at the south end, and for a greater portion of the distance along the line of plaintiff's property, it was only about twenty feet from the street line and about eight feet from the sidewalk, a space not sufficient for wagons to pass each other. Opposite the north line of plaintiff's property, at the junction of Third and H streets, this approach was about thirteen and a half feet above the street surface. From that point it descended southerly by a gradual descent, reaching the surface of the street at the intersection of Third and G streets. It was supported by timbers resting on the street surface, and was so constructed

and timbered as to be practically a solid structure, and formed an effectual barrier to the crossing of that part of the street by vehicles. The plaintiff obtained a decree affirming the report of a referee, and the defendant appealed.

*William W. Cotton, Cox, Teal & Minor, and Snow & McCamant*, for the appellant.

*James Finley Watson and Edward B. Watson*, for the respondent.

<sup>227</sup> BEAN, C. J. 1. Counsel for defendant seeks to reverse the decree of the court below on the grounds: 1. That the erection of the bridge and its approach in Third street, under legislative and municipal authority, violates no property rights of plaintiff, and consequently it is without remedy, although its property may be injured; and 2. The plaintiff's remedy, if it has any, is by an action at law to recover damages, and not by suit for an injunction. But few questions have come before the courts in recent years involving larger pecuniary interests or of greater practical importance, or which have provoked more discussion, than those growing out of the enforcement by abutting lotowners of their right to compensation for the occupation and use of streets under legislative or municipal authority by private corporations for public use, under constitutions like ours, which provide that private property shall not be taken for public use without just compensation. It is quite generally agreed that any proper exercise of governmental power over a street in a municipality, for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking within the meaning of the constitution, and will not entitle the adjoining proprietor to compensation, or give him a right of action: Cooley on Constitutional Limitations, 5th ed., 671; <sup>228</sup> *Transportation Co. v. Chicago*, 99 U. S. 635. It is within this principle that changes of grade; the use of a street for a surface street railroad; the erection of lamps, hitching-posts, telephone, telegraph, and electric-light poles; the laying of sewer and water pipes; the crossing of streets over railway tracks by means of elevated viaducts, are, when authorized by lawful authority, held *damnum absque injuria*, although the abutting owner may be seriously injured, and the value and usefulness of his property greatly impaired. This is upon the ground that individual interests in streets

are subservient to those of the public, and that an adjoining owner received full compensation for such injury as might result to him or his grantees from the use of the street for proper street purposes at the time of the dedication or appropriation of the land therefor. But there is a limitation to legislative or municipal power over a street, which cannot be exceeded without invading the constitutional rights of abutting owners. An abutting proprietor is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and therefore any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking within the meaning of the constitution, whether the fee of the street is in the abutting owner or not. He holds his property subject to the power of the proper legislative authority to control and regulate the use of the street as an open public highway, and hence any authorized use thereof, though a new one, gives him no cause of action. But such holding is not subject to the legislative power to divert the street from legitimate street purposes by authorizing a structure thereon which is inconsistent with its continuous use as an open public street. Any structure on a street which is <sup>239</sup> subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made: *Elliott on Roads and Streets*, 526; *Tiedeman on Municipal Corporations*, 301; *Lewis on Eminent Domain*, sec. 126; *Booth on Street Railway Law*, secs. 80, 81; 2 *Dillon on Municipal Corporations*, secs. 711, 712, 723 c; *McQuaid v. Portland etc. Ry. Co.*, 18 Or. 237; *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122; 43 Am. Rep. 146; *Lahr v. Metropolitan Ry. Co.*, 104 N. Y. 268; *Reining v. New York etc. Ry. Co.*, 128 N. Y. 157; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Barney v. Keokuk*, 94 U. S. 324; *State v. Mayor of Jersey City*, 52 N. J. L. 65. As said by Andrews, J., in *Kane v. New York Elevated R. R. Co.*, 125 N. Y. 165: "However difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in a municipality, has, by virtue of proximity, special and peculiar

rights, facilities, and franchises in the street, not common to citizens at large, in the nature of easements therein, constituting property of which he cannot be deprived by the legislature or municipality, or by both combined, without compensation." And in *Story v. New York Elevated R. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146, the rule is thus stated by Tracey, J: "While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon, which is subversive of and repugnant to the uses of the street, as an open public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must <sup>230</sup> be largely a question of fact, depending upon the nature and character of the structure authorized."

2. This brings us to the question, then, whether the occupation of Third street by the approach to defendant's bridge is compatible with or destructive of its use as an open public street. As already stated, this street is about sixty feet in width, and the approach complained of is practically a solid structure thirty feet wide in the middle of the street, so that no use can be made of that portion of the street occupied by it except by persons desiring to use defendant's bridge and pay toll therefor. In other words, it is in fact an appropriation of a public street to the exclusive use of a private corporation, and to the manifest injury of an abutting proprietor. The plaintiff and the public are absolutely and permanently excluded from the use for general street purposes of all that portion of Third street covered by the approach. It practically terminates the street as an open public thoroughfare at the north line of G street, in place of the north line of H street as it is laid out and dedicated; and the only roadway in front of plaintiff's property is but a few feet wide, and quite insufficient for the proper and necessary use of such property, or for the accommodation of public travel. While the city authorities undoubtedly have power to authorize the use of the street for legitimate street purposes, we do not think the public can justly demand or require such a sacrifice of private interests, or justify such an exclusive and permanent appropriation of a street in aid of a private enterprise, although for public purposes, as is contemplated in this case. It may be conceded that the general interests of Portland and the public at large are promoted by the appropriation of the street to the purposes of an approach to defendant's bridge;



but it by no means follows that the burden of such a public improvement can rightfully be cast upon this plaintiff by appropriating <sup>231</sup> its property for the public benefit, without compensation. We think, therefore, that while it is competent for the legislature or municipality to authorize the use of a street for legitimate street purposes, without making compensation to abutting owners for consequential injuries to their property, they cannot legally authorize structures of the character complained of to be erected thereon for the use and convenience of a private corporation, and which absolutely and permanently exclude the public and the abutting owner from the portion of the street so occupied, without compensating the adjoining proprietor for the injury sustained.

3. The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly untenable. The city of Portland has undoubted plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public street; and while such permission included as a consequence the construction of a solid roadway above and over the street surface, it does not follow that what was done was in the exercise of the power to alter or change the grade of the street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. The primary <sup>232</sup> object of this grant of power is to enable the municipality to make the streets safe and convenient for public travel, and not to divert them from legitimate street purposes to the exclusive use of some private corporation. Conceding, therefore, that defendant occupies this street by lawful authority, and hence its structure is not a nuisance, yet it invades the legal rights of an abutting owner, and is an appropriation of the property of such owner without compensation, which is

beyond the power of the legislature or municipality, or both, constitutionally, to authorize or sanction.

4. The defendant's counsel also claims that plaintiff's remedy is by action at law to recover damages, and not by a suit in equity to enjoin and restrain the defendant from maintaining the approach complained of. He relies principally upon the case of *Osborne v. Missouri Pac. Ry. Co.*, 147 U. S. 248. This was a suit by an abutting owner to enjoin the defendant from laying down its railroad track at street grade under competent municipal authority, on the ground that the track would be a permanent obstruction, and the damage threatened to be done complainant was irreparable, and could not be compensated for by a recovery in an action at law. The constitution of Missouri provides that private property shall not be taken or damaged for public use without just compensation, but, while the statutes of that state contain ample provisions for the assessment of compensation for the taking of property, there is no provision therein for such assessment when the property is merely damaged. It was therefore held, that the laying down of defendant's track at the grade of the street was not an exercise of the power of eminent domain, or the taking of private property for public use, there was no proceeding authorized by law which the railway company could avail itself of, to obtain an assessment of damages, while the complainant ~~was~~ had an adequate remedy by action at law, and therefore the injunction should be denied, and the plaintiff remitted to his remedy at law. But in this case, as we have endeavored to show, the act sought to be restrained is a taking of private property for public use, and in such cases our statute has made adequate provision for the assessment of compensation therefor. Provision is not only made by statute for determining the compensation to be paid the owner, but its payment is made a condition precedent to the right to take the property, and it is within the power of the defendant to comply with this condition. In such case, as we understand the rule, an injunction will almost universally be granted, at least until the condition is complied with. The rule is very clearly stated by Mr. Chief Justice Fuller in the case referred to as follows:

"Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends courts of equity are

not curious in analyzing the grounds upon which they rest their interposition. Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive, or of a continuous character or irreparable in its nature; and the appropriation of private property to public use under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work. And if the case made discloses only a <sup>324</sup> legal right to recover damages, rather than to demand compensation, the court will decline to interfere": To the same effect is Booth on Street Railway Law, 189; Elliott on Roads and Streets, 536; Tiedeman on Municipal Corporations, sec. 307; 2 Dillon on Municipal Corporations, sec. 723 d; *Story v. New York Elevated R. R. Co.*, 90 N. Y. 179; 43 Am. Rep. 146; *Lahr v. Metropolitan etc. R. R. Co.*, 104 N. Y. 268; *Columbus Ry. Co. v. Witherow*, 82 Ala. 190; *State v. Berdett*, 73 Ind. 185; 38 Am. Rep. 117.

5. As the structure, the maintenance of which is sought to be restrained in this case, is permanent and exclusive in its character, and, if suffered to continue as now located, will inflict a continuing and permanent injury upon the plaintiff, we think it manifest that it is entitled to restrain the continuation thereof by an injunction; but, as it was constructed with the knowledge of and without objection by plaintiff, on the assurance, however, of the defendant, that it was only intended as a temporary expedient and not as a permanent structure, and the fact that it has become and is one of the principal avenues across the river, and daily used by a large number of electric-cars, wagons, and foot passengers, the injunction should not be made mandatory until the defendant has had a reasonable time after the mandate is filed in the court below, to be determined by that court, to acquire the plaintiff's easements in the street by agreement or by proceedings to condemn the same if it should be so advised. It follows that the decree of the court below must be affirmed,

and the cause will be remanded for further proceedings in accordance with this opinion.

Affirmed.

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**STREETS—RIGHTS OF ADJOINING OWNERS.**—An abutting owner, the fee of the streets being in the city, is entitled to the use of the street, and neither the legislature nor the city can devote it to purposes inconsistent with street uses, without compensation. An abutting owner on streets possesses, as an incident to such ownership, easements of light, air, and access in and from the adjacent streets, for the benefit of these abutting lands, and the appurtenant easements and outlying rights constitute private property of which he cannot be deprived without compensation: *Abendroth v. Manhattan Ry. Co.*, 122 N. Y. 1; 19 Am. St. Rep. 461; note to *Bannon v. Rohmeiser*, 29 Am. St. Rep. 357. An abutting owner's right to use the street as a street is as much property as the street itself, and neither the public, a corporation, nor an individual can lawfully deprive him of it, against his will, without compensation: *Theobald v. Louisville etc. Ry. Co.*, 66 Miss. 279; 14 Am. St. Rep. 564; *City of Buffalo v. Pratt*, 131 N. Y. 293; 27 Am. St. Rep. 592.

**EMINENT DOMAIN—COMPENSATION—MANDATORY INJUNCTION.**—A municipal corporation has no power to devote its streets or alleys, or any part thereof, to a private use: *Field v. Barling*, 149 Ill. 556; 41 Am. St. Rep. 311, and note. And to deprive a person of the ordinary beneficial use and enjoyment of his property is a "taking" thereof: See monographic note to *Vanderlip v. City of Grand Rapids*, 16 Am. St. Rep. 610, on what constitutes a taking of property for public use. An abutting owner may enjoin the use of a street for purposes inconsistent with those uses to which streets should be or, ordinarily have been, subjected: *City of Buffalo v. Pratt*, 131 N. Y. 293; 27 Am. St. Rep. 592; note to *Parke v. Seattle*, 34 Am. St. Rep. 849. But an abutting owner can complain only when the street is subjected to a new servitude, inconsistent with and subversive of its use as a street: *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308; 35 Am. St. Rep. 706. A mandatory injunction will be issued only when a court of law cannot grant adequate relief, or where full compensation in damages cannot be made: *Atchison etc. R. R. Co. v. Long*, 46 Kan. 701; 26 Am. St. Rep. 165, and note.

**STREETS—OBSTRUCTIONS—APPROACH TO BRIDGE—DAMAGES.**—A city has no right to obstruct, or to authorize the obstruction of its streets so as to deprive property owners of free access to and from their adjacent lots; and, if it permits or authorizes the use of a street for an approach to a bridge, it must see that the approach is so constructed as not to produce injury to the adjoining owner: See monographic note to *O'Brien v. Philadelphia*, 30 Am. St. Rep. 842, on liability of cities for change of grade of streets.

## STATE v. MASON.

[28 OREGON, 273.]

**LIBEL—EVIDENCE AS TO PERSON REFERRED TO.**—If the words of a libelous article are ambiguous as to the person intended, persons who read the libel and are acquainted with the parties and the circumstances may state their judgment and understanding as to whom it refers. This rule of evidence is the same in both civil and criminal cases.

**LIBEL—PRESUMPTION OF MALICE.**—Every libelous publication concerning another is presumed to have been made maliciously, whether the offender intended ill-will toward the person injured or not. This presumption continues until it appears that the libel is in fact true, and was published with good motives and justifiable ends.

**LIBEL—REFERENCE TO PROPERTY.**—If the words of a libelous publication apply to the property of the prosecuting witness in such a manner as to injure his reputation by exposing him to hatred, contempt, or ridicule it is a libel upon him.

**LIBEL—INTENT TO INJURE—MALICE.**—Under a statute providing that, if any person shall publish or cause to be published concerning another any false or scandalous matter, "with intent to injure or defame," he shall be punished, etc., it is not necessary, to constitute the offense of libel, that the publisher should have entertained a specific malicious intent "to injure and defame" the prosecuting witness, as the natural and probable consequence of the publication is to injure and defame, and the law will infer that the publisher intended the results of his act.

**MALICE.**—To RENDER AN ACT MALICIOUS it is not necessary that the party doing it shall be actuated by a feeling of hatred or ill-will, or by a distinct purpose to injure.

**LIBEL—KNOWLEDGE OF MANAGER OR PROPRIETOR OF NEWSPAPER—DEFENSE.**—The manager or proprietor of a newspaper is *prima facie* criminally liable for a libel published therein, and cannot escape responsibility simply by showing that it was published without his knowledge or consent. He must further show that the publication did not occur through any negligence or want of ordinary care on his part.

**PROSECUTION** for criminal libel. Mason was convicted of this offense and appealed.

*James Finley Watson*, for the appellants.

*Wilson T. Hume*, district attorney, and *George E. Chamberlain*, attorney general, for the state.

274 BEAN, C. J. 1. The defendants were indicted, tried, and convicted of the crime of libel, for publishing in a newspaper called the *Sunday Mercury* a libelous article in which the name of the person alluded to therein, who, it is claimed, is the prosecuting witness, was not mentioned. For the purposes of this appeal it is unnecessary to set out the article so published, or its substance, and, therefore, for this and other

obvious reasons, it is omitted. At the trial witnesses were called by the state who testified that on reading the article they understood, from their acquaintance with the prosecuting witness and the circumstances alluded to in the publication, that it was intended and designed to refer to him. This evidence was admitted by the court, over the objection of defendant, and such ruling is relied upon as error. The meaning of the defendants, and whether the libel was of and concerning the prosecuting witness, are undoubtedly questions of fact, to be determined by the jury under the instructions of the court; but the important question still remains, can the understanding or impression that persons may get from reading the objectionable article be received as evidence of such <sup>275</sup> facts? Upon this question the authorities are somewhat conflicting. In the following reported cases it is held that such evidence is not admissible for any purpose: *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339; *Gibson v. Williams*, 4 Wend. 320; *Goodrich v. Davis*, 11 Met. 484; *Snell v. Snow*, 13 Met. 282; 46 Am. Dec. 730; *Oldtown v. Shapleigh*, 33 Me. 278. But, on the other hand, it is held, and we think with the better reason, that, when the words are ambiguous as to the person intended, and their application doubtful, persons who read the libel and are acquainted with the parties and the circumstances may state their judgment and understanding as to whom the libelous charges referred: 2 Greenleaf on Evidence, sec. 417; Odgers on Libel and Slander, 539; *Smart v. Blanchard*, 42 N. H. 137; *Russell v. Kelly*, 44 Cal. 641; 13 Am. Rep. 169; *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768; *Nelson v. Borchentius*, 52 Ill. 236; *Knapp v. Fuller*, 55 Vt. 311; 45 Am. Rep. 618; *McLaughlin v. Russell*, 17 Ohio, 475; note to *Van Vechten v. Hopkins*, 4 Am. Dec. 339. The weight of authority undoubtedly supports this latter doctrine, and we understand defendant's counsel to admit this to be the rule in actions for damages, but he contends it should not prevail in criminal prosecutions. This question, it seems to us, is settled by the statute of this state, which provides that the law of evidence in civil and criminal actions shall be the same, except as otherwise provided in the code (sec. 1364); but whether it is or not, we have been unable to discover any difference between civil and criminal actions in the general rule governing the admission of evidence to show that the words were intended to be used in an actionable sense, and, when ambiguous, to whom they were

intended to apply. In either case it is incumbent on the plaintiff or prosecution to show, by proper averments and proof, that the defendant intended to apply the words used to the plaintiff or person designated in the <sup>276</sup> indictment as the subject of the libel; and evidence competent in the one case must necessarily be so in the other. The object and purpose to be attained by such evidence is the same in civil and criminal cases, and the reason and necessity for its admission applies with equal force to both classes of actions: 3 Greenleaf on Evidence, sec. 174; *State v. Fitzgerald*, 20 Mo. App. 408; *Commonwealth v. Buckingham*, Thacher's Criminal Cases, 29; *Commonwealth v. Morgan*, 107 Mass. 199. In this case the language of the libel, so far as the person referred to is concerned, is ambiguous, and its application doubtful; and therefore, under the rule we have stated, the evidence of the witnesses as to whom they understood it to refer was competent.

The state, as part of its case in chief, offered in evidence, and the court admitted, against the defendant's objection, certain affidavits made by him for a continuance, separate trial, and change of venue. Just what the state expected to prove by these affidavits is not clear from the record before us; but, if their admission was an error, it was manifestly not a prejudicial one, as the affidavits contained nothing which could in any way, so far as we can see, affect the substantial rights of the defendant, or prevent a fair and impartial trial.

2. The remaining assignments of error are based on the giving and refusal of certain instructions by the trial court, and the defendant contends that the court, in charging the jury, fell into three leading errors which vitiated a number of the instructions given, and led to the rejection of all that he requested. Those three alleged errors, as stated by his counsel, are: 1. "That the proprietor or manager of a newspaper is liable criminally, under our statutes, for whatever appears in the paper, although it may have been published without his knowledge or consent; 2. That the publication being proven, the malice and intent to injure are conclusively presumed; 3. That a <sup>277</sup> person may be convicted of a libel upon the property of another." In reference to the last two questions as thus stated by counsel, it seems to us he has misinterpreted the language used by the court. We have carefully examined the instructions, but do not find it stated anywhere therein that malice and an intent to injure are con-

clusively presumed from the fact of publication. The court instructed the jury "that malice does not mean a personal ill-will toward a person libeled. If the publication be found libelous the law implies malice. If the publisher published carelessly, not knowing or indifferent what, he is held responsible as though he read every word. It is a settled principle of the law that every person is presumed to intend the reasonable and natural consequences of his own act; so, as I have said, if you are satisfied that the defendant published the newspaper article set out in the indictment, and that it was false and scandalous, you are obliged to presume that it was done maliciously and willfully, with intent to injure and defame." This is but an application to the facts in the case of the rule that when an injurious publication is false, and is in itself defamatory, the law infers malice, whether the offender intended ill-will toward the person injured or not: 3 Greenleaf on Evidence, 618; 2 Wharton's Criminal Law, sec. 1648; 2 Bishop's New Criminal Law, secs. 922, 923; *Commonwealth v. Snelling*, 15 Pick. 337; *Haley v. State*, 63 Ala. 83. Every injurious publication of and concerning another, if it contains libelous matter, is presumed to have been made maliciously, and this presumption continues until it appears that the matter charged as libelous is in fact true, and was published with good motives and justifiable ends.

3. Nor do we understand the court to have ruled that the defendant could be convicted for a libel upon the property of the prosecuting witness alone, but that, if the words used apply to his property in such a manner as to <sup>278</sup> injure his reputation by exposing him to hatred, contempt, and ridicule, it would be a libel upon him, and this we believe to be the law.

4. This brings us to the most important question in the case, and that is whether, under our statute, it is a defense for the proprietor or manager of a newspaper, when indicted for libel, to show that the libelous article was published without his consent or knowledge. The statute provides that "if any person shall . . . publish or cause to be published of or concerning another any false or scandalous matter with intent to injure or defame such other person, upon conviction thereof (he) shall be punished," etc: Hill's Code, sec. 1749. It is contended for the defendant that, to constitute the offense of libel under this statute, the defendant must have entertained a specific intent "to injure and defame" the pro-



ecuting witness, and that this intent could not have existed if the publication was made without his knowledge or consent. But the law presumes that every person intends the natural and probable consequences of his own act, and therefore, as the natural and probable consequences of the publication alleged in the indictment were to injure and defame the prosecuting witness, the law will infer that the defendant, if he caused or negligently permitted the publication, intended such consequences, although he may have entertained no special ill-will or malice toward the person injured. "It is not necessary, to render an act malicious," says Chief Justice Shaw, "that the party be actuated by a feeling of hatred or ill-will toward the individual, or that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he willfully inflicts a wrong on <sup>279</sup> others which is not warranted by law, such act is malicious": *Commonwealth v. Snelling*, 15 Pick. 340.

5. The question then recurs as to whether the manager or proprietor of a newspaper can escape criminal responsibility solely on the ground that the libelous article was published without his knowledge or consent. When a libel is published in a newspaper, such fact alone is sufficient evidence *prima facie* to charge the manager or proprietor with the guilt of its publication. By the English authorities prior to statutes 6 & 7 Vict., c. 96, it was generally held, though not without some dissent, that the presumption was not overcome by showing that the defendant was perfectly innocent of any share in the criminal publication, upon the ground that it was necessary in order to prevent the escape of the real offender behind some irresponsible person: *Rex v. Gutch*, 1 Moody & M. 433; 22 Eng. Com. L. 559; *Rex v. Walter*, 3 Esp. 21. But, by the statute referred to, the question was put at rest, and a defendant was permitted to prove as a defense that the publication was made without either his consent or knowledge, and that it did not arise from want of due care or caution on his part. This, it is believed, is but a statutory declaration of the principles which ought to limit criminal liability for the acts of another, and which have generally been recognized by the courts of this country in similar cases. The manager and proprietor of a newspaper, we think ought to be held *prima facie* liable crimi-

nally for whatever appears in his paper; and it should be no defense that the publication was made without his knowledge or consent, unless it further appears that it did not occur through any negligence or want of ordinary care on his part. One who furnishes the means for carrying on, and derives profit from, the publication of a newspaper, and intrusts its management to servants or employees whom he selects <sup>290</sup> and controls, may be said to cause to be published what actually appears, and should be held responsible therefor, whether he was individually concerned in the publication or not, if he did not exercise proper care and oversight over the business intrusted to his servants. Criminal responsibility for the acts of an agent or servant in the course of his employment necessarily implies some degree of moral guilt or delinquency on the part of the principal; but this may be shown either by direct participation in or assent to the act, or by a want of proper care or oversight, or other negligence in reference to the business intrusted to the servant. We think, therefore, the mere fact that the libelous article was published in the newspaper without the knowledge or consent of its proprietor or manager is no defense to a criminal prosecution against such proprietor or manager. In *Commonwealth v. Morgan*, 107 Mass. 199, this question was considered, and it was held that in a criminal prosecution the publisher of a newspaper in which a libel appears is *prima facie* presumed to have published the libel, and that the exclusion of an offer by the defendant to prove that he never saw the libel, and was not aware of its publication until it was pointed out to him, and that an apology and retraction were afterward published in the same paper gave him no ground of exception. This case is so well considered, and the rule governing the criminal liability of the publisher of a newspaper for a libelous article appearing therein is so satisfactorily stated, that we venture to quote from the opinion of the court at some length. The court, speaking through Mr. Justice Colt, says: "It is the duty of the proprietor of a public paper, which may be used for the publication of improper communications, to use reasonable caution in the conduct of his business, that no libels be published. He is civilly responsible for the wrong, to the extent indicated; and he is criminally <sup>291</sup> liable, unless the unlawful publication was made under such circumstances as to negative any presumption of privity, or connivance, or want of ordinary pre-

caution on his part to prevent it: 3 Greenleaf on Evidence, secs. 170, 178. We are of opinion that the offer of defendant did not go far enough, in view of the law thus stated, to rebut the presumption of guilt arising from the publication of this libel. The facts offered may be true, and yet entirely consistent with the fact that the conduct of the newspaper was under his actual direction and charge, at a time when he was neither absent from home nor confined by sickness, and when his want of knowledge would necessarily imply criminal neglect to exercise proper care and supervision over the subordinates in his employ. It is consistent also with such information in this instance, in regard to the proposed libelous attack, as should have put him on inquiry; and with the fact that the general management of the paper was of such a character as to justify the inference that the defendant approved of or connived at publications of this description, and had given his general assent to them. Under such circumstances the defendant ought not to be permitted to escape on the plea that he had not seen the particular article, and did not know of its publication."

So, also, in the case at bar. The fact that defendant did not see or know of the libelous article until after its publication is not in any way inconsistent with the other fact that the paper may have been under his personal supervision and control, so that his want of knowledge would necessarily imply either a criminal neglect in failing to exercise proper care and supervision over his subordinates, or criminal indifference as to the character of the articles appearing in the paper. It is entirely consistent, also, with the fact that the management of the paper and its <sup>282</sup> general character may have been such, and, indeed, if we are to judge from the copy of it appearing in the transcript, it undoubtedly was such as not only to justify the inference but the belief that its proprietor or manager approved of or connived at the publication of articles of the character set out in the indictment, and had at least given his general consent to their publication. Under such circumstances, and in view of the law as we understand it, the court committed no error in instructing the jury that "it is not a justification in a newspaper proprietor to show that the article was published without his consent or knowledge": Wharton's Criminal Law, secs. 1627, 1649; 1 Bishop's New Criminal Law, secs. 219-221; *People v. Wilson*, 64 Ill. 495; 16 Am. Rep. 528; *Commonwealth v. Damon*, 186 Mass.

441. Finding no error in the record, the judgment of the court below must be affirmed.

Affirmed.

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**LIBEL.**—If words amount to a libelous charge against some person, but it is not clear as to whom they refer, their application to the plaintiff may be shown by proof of extrinsic facts, though such facts are not alleged in the complaint, and, if such words are read by persons conversant with the facts, it is competent to show by their testimony, who, in their opinion, was referred to by the language used: Note to *Wimer v. Allbaugh*, 16 Am. St. Rep. 425; *Miller v. Butler*, 6 Cush. 71; 52 Am. Dec. 768, and note showing cases to the contrary. Any publication injurious to the character of another and not shown to be true, or to have been justifiably made, is actionable, malice being inferred in such a case: Note to *Upton v. Hume*, 41 Am. St. Rep. 873. The law imputes malice to the publisher of a libel from the act of publication: Note to *Alabama etc. Ry. Co. v. Brooks*, 30 Am. St. Rep. 533. In a legal sense malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally without just cause or excuse: See monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 337, on newspaper libel. The absence of malice in fact, therefore, will not relieve the defendant from liability for such injuries as he may have inflicted on the plaintiff by the publication of a libel upon him: Note to *McAllister v. Detroit Free Press*, 15 Am. St. Rep. 338. An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt, or ridicule: Notes to *Adams v. Lawson*, 94 Am. Dec. 460; *Terwilliger v. Wanda*, 72 Am. Dec. 426. The proprietor of a newspaper is responsible for whatever appears in its columns. It is no defense that a libel was printed without his knowledge, though the absence of any negligence or carelessness on his part would probably be sufficient to prevent his conviction if prosecuted criminally. The intention to produce the probable results of the libel must be presumed: See monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 334, 335, 339, on newspaper libel.

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## NORTH PACIFIC CYCLE COMPANY v. THOMAS.

[26 OREGON, 381.]

**JUDGMENT—DEFICIENT PLEADINGS—COLLATERAL ATTACK.**—If the object of the plaintiff can be ascertained from his complaint, and the court has power to grant the relief demanded and jurisdiction of the parties, the judgment rendered is not subject to collateral attack, although the complaint may, in fact, have been bad in substance.

**JURISDICTION.**—THERE IS AN IMPORTANT DIFFERENCE BETWEEN A WANT OF JURISDICTION AND A MERE DEFECT in obtaining it. In the former case the judgment is absolutely void. In the latter case it is simply erroneous and voidable, and can be attacked only by some direct proceeding authorized by law.

**PROCESS—SERVICE OF SUMMONS—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.**—The object of serving a summons is to advise the defendant that an action has been commenced against him, and to warn him that

he must appear within a time and at a place named, and make such defense as he has, and, in default of his so doing, that judgment against him will be taken in the sum designated. If it accomplishes these purposes it confers jurisdiction, though there may have been some irregularity in its form or in the manner of its service. Hence a judgment based upon it is good against a collateral attack.

**PROCESS — SERVICE OF SUMMONS BY SPECIAL OFFICER.** — Under a statute making provision for the appointment of a person to serve process in a justice's court, if there is want of an officer, an indorsement on the summons reciting that, "the constable of said district being unable to act herein, and it appearing that the within process will not be served for want of an officer, I hereby appoint H. C. W. to make service," and signed by the justice, authorizes the appointee to serve the process.

**ACTION** to recover possession of a bicycle seized by the defendant, as constable, under an execution issued on a judgment in favor of one Candrian, and against the plaintiff. The only question raised was as to the validity of the judgment. The action by Candrian was commenced in a justice's court to recover of the cycle company damages for a breach of contract. A summons was issued in the form prescribed by the justice's code. This summons, with a copy of the complaint, was served by one H. C. Wood, who was specially appointed by the justice for that purpose. Judgment for want of an answer was entered, and plaintiff, in this case, claimed that the judgment was void because the complaint upon which it was based did not state a cause of action; because the summons issued thereon was not in the form prescribed by the act of 1893 (Laws 1893, p. 38); and because there was no sufficient record of the appointment of H. C. Wood to serve the summons. There was judgment for defendant and plaintiff appealed.

*Robert C. Wright*, for the appellant.

*Theodore J. Geisler and George W. Hazen*, for the respondent.

383 BEAN, C. J. 1. The complaint as filed in the justice's court may have been subject to a demurrer, but it does not follow that a judgment entered thereon is void. If the object of the plaintiff can be ascertained from the allegations of his complaint, and the court has power to grant the relief demanded, and jurisdiction of the parties, the judgment is not vulnerable to a collateral attack, although the complaint may in fact be bad in substance: *Van Fleet on Collateral Attack*, sec. 256; *Berry v. King*, 15 Or. 165.

2. If it be conceded that the summons was defective, because not in the form prescribed in the act of 1893, it was,

nevertheless, issued and signed by the proper officer, and contained information sufficient to warn the company that a judicial proceeding was pending against it in a particular court, and that, if it did not appear therein on a certain day and answer the complaint, a copy of which was served with the summons, judgment would be taken against it for a certain sum of money; and we are therefore of the opinion that the judgment given for want of such appearance cannot be questioned in a collateral proceeding. There is an important difference between a want of jurisdiction and a mere defect in obtaining it. In the former case the judgment is absolutely void, and may be impeached whenever it is sought to be used as a valid judgment; but in the latter case it is simply erroneous and voidable, and can be attacked only in some direct proceeding authorized by law. When there is some irregularity in the form of the process, or in the manner of its service, the party served can take advantage thereof by some appropriate proceedings in the court where the action is pending, and by neglecting to do so he waives the irregularity and cannot attack the <sup>284</sup> judgment in a collateral proceeding. "The objects to be accomplished by process," says Mr. Freeman, "are to advise the defendant that an action or proceeding has been commenced against him by plaintiff, and warn him that he must appear within a time and at a place named, and make such defense as he has, and, in default of his so doing, that judgment against him will be applied for or taken in a sum designated, or for relief specified. If the summons actually issued accomplishes these purposes it should be held sufficient to confer jurisdiction, though it may be irregular in not containing other statements required by the statute. If, on the other hand, it is wanting in these essential particulars, it will generally fail to give the court jurisdiction": Freeman on Judgments, sec. 126. Judge Van Fleet, in his recent very excellent work on Collateral Attack, in discussing this question, says: "It being impossible to avoid errors, and the law having prescribed a method of correction by motion to quash or set aside the process, it would seem, on principle, that, where the process is sufficient to inform the person that a proceeding has been instituted against him in a specified judicial tribunal, that method ought to be exclusive. This is the rule, I believe, to be established by the authorities considered in section 329, *supra*": Van Fleet on Collateral Attack, sec. 347. Now, the summons and com-

plaint as actually served upon the company advised it that Candrian had commenced an action against it for a certain sum of money as damages for breach of a certain contract, and contained a warning that defendant must appear at a time and place specified and make such defense as it had, in default of which judgment would be taken against it in the sum designated, and, within the rule stated, were sufficient to sustain the judgment against a collateral attack: *Keybers v. McComber*, 67 Cal. 395; *Boynston v. Fly*, 12 Mo. 17; *Isaacs v. Price*, 2 Dill. 347, Fed. Cas. No. 7097.

395 3. Some of the authorities cited under the previous head would seem to indicate that if Wood, who served the summons in the action in the justice's court, was incompetent to make a valid service, such fact could only be taken advantage of by some direct proceedings. However this may be, his appointment was made by an indorsement on the summons in the manner provided in section 2173 of Hill's Code, and was signed by the justice and recited that "the constable of said district, being unable to act herein, and it appearing that the within process will not be served for want of an officer, I hereby appoint H. C. Wood to make service of the within summons." This, we think, was, under the statute, a sufficient appointment, and authorized Wood to serve the process: *Morse v. Carpenter*, 31 Neb. 224. Having reached the conclusion that the judgment of the justice's court cannot be declared void in collateral proceeding, the judgment from which this appeal was taken must be affirmed. Affirmed.

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PROCESS—JURISDICTION—JUDGMENT—COLLATERAL ATTACK.—Defects in a complaint do not authorize a collateral attack upon the judgment. They do not go to the question of jurisdiction. It is sufficient that the complaint informs the court and the defendant of the relief demanded and of the facts upon which the right to such relief is based: *In re James*, 99 Cal. 374; 37 Am. St. Rep. 60. An error of the court in holding the complaint sufficient will not render its judgment subject to collateral attack: *Taylor v. Coots*, 32 Neb. 30; 29 Am. St. Rep. 425, and note; *In re James*, 99 Cal. 374; 37 Am. St. Rep. 60, and note. There is a clear distinction between an entire want of jurisdiction and an irregularity in some one of the steps taken to obtain it: *In re James*, 99 Cal. 374; 37 Am. St. Rep. 60. A want of jurisdiction, either of the person or subject matter, appearing upon the face of the record can be taken advantage of at any time and in any court where the conclusiveness of the judgment or decree is the subject of judicial inquiry: *Rogers v. Cady*, 104 Cal. 288; 43 Am. St. Rep. 100, and note. But a collateral attack on a judgment or order cannot be successful unless such judgment or order is void: *Dyer v. Leach*, 91 Cal. 191; 25 Am. St. Rep. 171, and note. Hence,

when there is general jurisdiction of a subject, though vested in an inferior tribunal, its judgment cannot be collaterally attacked. This applies to a judgment of a justice of the peace: Note to *Leonard v. Sparks*, 38 Am. St. Rep. 655. The judgment cannot be collaterally impeached for errors of law or irregularities of practice: Note to *Taylor v. Coots*, 29 Am. St. Rep. 433; note to *In re James*, 37 Am. St. Rep. 67. The object of a summons is to inform the defendant that an action or other proceeding has been commenced against him in a court therein named, and to warn him that, unless he appears and makes some defense within a time designated, he will be regarded as confessing the allegations of the complaint, and as authorizing the court to enter against him any judgment prayed for therein and sustained thereby: See monographic note to *Choate v. Spencer*, 40 Am. St. Rep. 431, on jurisdictional defects in summons and like process, and showing that when the process and its service are acquiesced in by the defendant and impliedly adjudged sufficient by the court, third persons, and even the plaintiff, should be entitled to regard any formal defects therein as waived. A judgment rendered by a justice of the peace upon service of summons made by a special officer appointed upon an affidavit, which failed to show that "the business was urgent," is not void, but merely irregular: *Railway Co. v. Brooks*, 90 Tenn. 161; 25 Am. St. Rep. 673.

## LONGSHORE PRINTING COMPANY v. HOWELL.

[26 OREGON, 527.]

**PLEADING.**—UPON DEMURRER the probative facts alone are admitted. Statements of conclusions of fact or of law are not admitted.

**CONSPIRACY.**—TRADES UNIONS ARE NOT UNLAWFUL COMBINATIONS, so long as they do not resort to acts tending to destroy freedom of action, such as intimidation, threats, or violence. Hence, it is not contrary to public policy or illegal for a member of a union to combine with others for the purpose of maintaining wages or limiting the number of apprentices.

**TRADES UNIONS AND LABOR ORGANIZATIONS MUST DEPEND** for their membership upon the free choice of each member, and his perfect freedom of action. No resort can be had to violence, threats, intimidation, or other compulsory methods, in matters concerning membership, or to enforce the observance of their laws, rules, and regulations.

**CONSPIRACY AT COMMON LAW** was a combination between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means.

**STRIKES AMONG WORKMEN** are not necessarily unlawful, though they may become both illegal and criminal by the means employed to enforce their objects. Employees may lawfully quit their service either singly or in a body, but if unlawful means are used to uphold or maintain a strike, or if the end to be attained is unlawful, then the strike itself is unlawful.

**LABOR UNION—ORDERING EMPLOYEES TO STOP WORK.**—Under a statute making it a misdemeanor for any one by force, threats, or intimidation to prevent, or endeavor to prevent, any employee from continuing his work, the act of the executive committee of a labor union in enter-



ing the premises of a person and ordering all members of the union then and there at work to cease further work under penalty of being dealt with according to the laws and regulations of the union is not unlawful in the absence of intimidation, threats, or violence.

**BOYCOTT—INJUNCTION.**—Although a conspiracy may not be indictable under the statute a combination to injure the public or individuals is *per se* wrongful, and the fact that it is not made a statutory offense does not change the civil consequences. Hence, if two or more persons conspire and combine to injure or destroy another's business, and it is clearly made to appear that the injury is threatened and imminent, and will become irreparable to the suitor, an injunction will lie to restrain the conspirators, though no statute may be violated by their acts.

**BOYCOTT—INJUNCTION.**—In a complaint for an injunction to restrain a boycott on one's business, allegations that the officers and members of a certain trades union conspire to compel the plaintiff to submit to the dictation of the union upon pain of being boycotted in business; that the executive committee of the union entered his place of business without leave or license, and ordered the union men at work therein to cease work under penalty of being dealt with according to the laws and regulations of the union; that the defendants induced the city council, by threats of boycott at the polls, to reject the plaintiff's bid for the city printing, although it was the lowest made; that defendants threatened to boycott the plaintiff's customers if they patronized him, whereby he lost one customer and would lose another; and that defendants circulated a knowledge of such acts by the posting of notices, all of which acts were committed within a space of about ten months, to the past and future injury of plaintiff's business, do not justify an injunction, as such acts do not show that the plaintiff is without remedy in a court of law, or that the injury will be irreparable unless enjoined.

**PLEADING.**—In a complaint for an injunction against a boycott the plaintiff must definitely state the facts and circumstances constituting the proximate cause of his injuries, or the apprehension of those threatened and imminent.

**BOYCOTT—INJUNCTION.**—An injunction will issue to protect property rights against irreparable damage by wrongdoers, and it is a proper and available remedy to stay the destructive and pernicious ravages of a boycott, but the power to grant it in such cases should be cautiously exercised. It will be refused until it appears that some right is about to be destroyed, irreparably injured, or that great and lasting injury is about to be done by an illegal act.

**INJUNCTION** to restrain a boycott against plaintiff's business. The plaintiff was incorporated and engaged in the business of lithographing, engraving, printing, and publishing journals, newspapers, etc. The Multnomah Typographical Union was an unincorporated voluntary association, of which the defendant Howell was president. Other defendants were members or ex-members of the union's executive committee. The object of the association was, in part, to establish and maintain an equitable scale of wages. Such a scale was

adopted, and the membership of the union was confined to printers, and included only persons directly employed in printing books, newspapers, etc., such as compositors, proof-readers, foremen, pressmen, and stereotypers. The by-laws of the union also made provisions for limiting the number of apprentices for each newspaper office. The plaintiff's was a nonunion office and violated the rules of the union as to the number of apprentices to be employed, and, upon the union's request to discharge the additional apprentice, refused to do so. The union sought to compel the plaintiff to submit to its dictation upon pain of being boycotted in its business.

*John H. Handy*, for the appellant.

*McGinn, Sears & Simon, and Alfred F. Sears, Jr.*, for the respondent.

<sup>535</sup> WOLVERTON, J. 1. The questions presented for our consideration arise upon demurrer to the complaint, and hence all the allegations contained therein must be taken as true. This rule <sup>536</sup> must be understood, however, to include only such allegations as contain statements of facts as distinguished from statements of conclusions of fact or of law. It is a well-settled rule of pleading that bare allegations of conclusions cannot avail the pleader, especially where a demurrer is interposed, without a statement of the probative facts upon which said conclusions are based. Even then the conclusions may often be stricken out upon motion as irrelevant and redundant matter. A brief summary of the definite, tangible facts which appear upon the face of the complaint, and which alone can form the basis of this suit, will aid us materially in arriving at a correct conclusion as to whether the plaintiff is entitled to relief in equity by the extraordinary remedy of injunction. The existence of the plaintiff as a corporation, and of the Multnomah Typographical Union, No. 58, as a voluntary unincorporated association, the objects of such association as shown by its constitution and by-laws, and the relations which defendants bear to such association, are all facts which are taken as granted. The overt acts charged upon which equity jurisdiction is invoked are about as follows: 1. The executive committee of the Multnomah Typographical Union, No. 58, without leave or license, and without lawful business, entered the premises of plaintiff and ordered all union men employed therein to quit under penalty of being dealt with in accordance with the laws, rules,

and regulations of the union, which order was obeyed by the men; 2. The committee and members of the union circulated the fact that the employees of plaintiff had been called off; 3. The committee published the following advertisement in the local news columns of the *Oregonian*:

"TO OUR FRIENDS.

"Persons intending having job printing done will bear in mind that the Longshore establishment on Front, between Alder and Washington streets, is a nonunion office.

537 "EXECUTIVE COMMITTEE MULTNOMAH TYPOGRAPHICAL UNION, No. 58."

4. The committee and members of the union induced the common council of the city of Portland to reject plaintiff's bid for the city printing for the year 1893, by threatening said council with their displeasure and boycott at the polls; 5. On the twelfth day of March, 1893, the union passed a resolution ordering all union men working for plaintiff to quit, and that the men, being intimidated thereby, observed the order; 6. The committee caused the following notice to be posted in numerous places, viz: "Owing to the Longshore Printing Company breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16, 1893"; 7. The committee notified plaintiff that they now intended to fight it to the death; 8. The Meier & Frank Company, whose business was valuable to plaintiff, withdrew their patronage, and Mason, Ehrman & Co., whose business is also valuable, notified plaintiff of their intention to withdraw.

All these acts are alleged to have been committed in pursuance of a conspiracy entered into by and between the executive committee and the members of Multnomah Typographical Union, No. 58, for the purpose of injuring and destroying plaintiff's business, or compelling it to submit to the rules and regulations of the association. When divested of all surplusage the complaint simply shows that defendants have been guilty of one act of trespass, that of entering plaintiff's premises unbidden; some acts by reason of which plaintiff was deprived of certain business, that of the city printing for the year 1893; and of some acts on account of which one customer, the Meier & Frank Company, has withdrawn its employment of plaintiff, and another 538 gave notice of an intention to do likewise. These constitute all

the specific injuries which plaintiff has sustained at the hands of the defendants. To prevent further threatened injuries of the same nature, and the damage to plaintiff's business from becoming irreparable, an injunction is sought. The publication in the *Oregonian*, the posting of said notices, the circulation of the fact that the union employees of plaintiff had been called off, and the threat made directly to the plaintiff by the executive committee that they "now intend to fight it to the death," can hardly be termed such acts of malicious, unwarranted aggression as must of themselves be regarded as actionable *per se*, but of this we will have more to say hereafter.

2. It is apparent that one purpose of this suit is to prevent strikes by the union employees of the plaintiff, or, to put it more directly, to prevent the union from calling off or interfering with such of said employees as the association is able to control through its organization. At one time, in England, it was maintained by some judges that trades unions were illegal combinations, and indictable at common law. In *Rex v. Mawbey*, 6 Term. Rep. 636, Grose, J., by way of illustration, makes use of the following language: "As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages, if he can; but, if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy." From a review of this case it is apparent that this language was not necessary to a decision of the points made. In *Hilton v. Eckersley*, 6 El. & B. 52, Crompton, J., in referring to *Rex v. Mawbey*, 6 Term. Rep. 636, says that Grose, J., "assumed the illegality of such combinations as well-known law," and further remarked that "combinations of this nature, whether on the part of the workmen to increase, or of the masters to lower, wages were equally illegal." But Lord Campbell, C. J., in a concurring opinion with Crompton, J., <sup>539</sup> seriously doubted whether such was the law, and after citing *Rex v. Mawbey*, 6 Tenn. Rep. 636, said: "I cannot bring myself to believe, without authority much more cogent, that if two workmen, who sincerely believe their wages to be inadequate, should meet and agree that they would not work unless their wages were raised, without designing or contemplating violence or any illegal means for gaining their object, they would be guilty of a misdemeanor, or liable to be punished by fine and imprisonment. The object is not illegal, and therefore, if no illegal means are to be used, there is no indict-

able conspiracy. Wages may be unreasonably low or unreasonably high; and I cannot understand why in the one case workmen can be considered as guilty of a crime in trying by lawful means to raise them, or masters in the other can be considered guilty of a crime in trying by lawful means to lower them." And later English authorities concede that members of trades unions binding themselves not to work except under certain conditions, and to support one another in the event of being thrown out of employment in carrying out the views of the majority, do not bring themselves within the criminal law: *Hornby v. Close*, L. R. 2 Q. B. 153; *Farrer v. Close*, L. R. 4 Q. B. 602. Since the enactment of statutes 6 Geo. IV, c. 129, as modified by 22 Vict. c. 34 and 35 Vict. c. 31, and similar statutes, trades unions are recognized as legal associations, with objects which they may endeavor to secure by pecuniary and other means of supporting strikes and the like, so long as they do not resort to secret or other violence, or to threats, intimidation, or any acts of like character, which will tend to destroy freedom of action. Early American cases are in consonance with the earlier English adjudications, but later authorities concur in the more reasonable and enlightened view that trades unions, in the ordinary acceptation of the term, are not within and of themselves unlawful combinations. <sup>540</sup> "It is no crime for any number of persons, without an unlawful object in view, to associate themselves together, and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions": *Carew v. Rutherford*, 106 Mass. 14; 8 Am. Rep. 287; *Snow v. Wheeler*, 113 Mass. 186; *Commonwealth v. Hunt*, 4 Met. 134; 38 Am. Dec. 346; *Rogers v. Evarts*, 17 N. Y. Supp. 268. It was therefore not unlawful for Multnomah Typographical Union, No. 58, to adopt a scale of wages. Neither was it unlawful for the union to make provisions in its by-laws limiting the number of apprentices to one for each newspaper office employing less than twenty-five men, and two when employing twenty-five or more, and one to each job office, and two when employing five journeymen on an average. No member of this association can now be charged with criminal conspiracy as under the common law, simply because of the fact that he with others have combined for the purpose of maintaining wages or limiting the number of apprentices, as contrary to public policy.

3. It must be understood, however, that these associations like other voluntary societies, must depend for their membership upon the free and untrammelled choice of each individual member. No resort can be had to compulsory methods of any kind either to increase, keep up, or retain such membership. Nor is it permissible for associations of this kind to enforce the observance of their laws, rules, and regulations through violence, threats, or intimidation, or to employ any methods that would induce intimidation <sup>541</sup> or deprive persons of perfect freedom of action. Such organizations may be preserved and their membership augmented by reasoning and fair arguments, and even by persuasion and entreaty, and an observance of their adopted constitutions and by-laws may be exacted through the same peaceful means, but beyond this it is not advisable from a legal standpoint to venture. So, much for the organization and its enforced coherence.

4. It has been said that there is no such thing as a legal or peaceful "strike." The term "strike" is differently defined by authors and judges. Webster defines it as "the act of quitting work; specifically, such an act by a body of workmen, done as a means of enforcing compliance with demands made on their employer." In 24 American and English Encyclopedia of Law, 123, it is defined as follows: "The term 'strike' is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a prearranged time, and refusing to resume work until the demanded concession shall have been granted"; and again by Allen, J., in *Delaware etc. R. R. Co. v. Bowns*, 58 N. Y. 582: "A strike is a combination among laborers, those employed by others, to compel an increase of wages, a change in the hours of labor, some change in the mode and manner of conducting the business of the principal, or <sup>542</sup> to enforce some particular policy, in the character or number of the men employed, or the like." From these definitions it would seem that all strikes are not unlawful, and do not necessarily engender breaches of the peace. Sir James Hannen, in his dissenting opinion in *Farrer v. Close*, L. R. 4 Q. B. 611, says: "I am of the opinion that strikes are not necessarily illegal. A strike is properly defined as 'a simultaneous cessation of work on the part of the workmen,' and its legality or illegality must depend on the means by which it is enforced, and

on its objects. 'It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton v. Eckersley*, 6 EL. & B. 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfillment of an engagement entered into between employers and employed, or any other lawful purpose." Justice Harlan, in the now celebrated case of *Arthur v. Oakes*, 63 Fed. Rep. 327, says: "We are not prepared, in the absence of evidence, to hold, as a matter of law, that a combination among employees having for its object their orderly withdrawal <sup>542</sup> in large numbers or in a body from the service of their employers, on account simply of a reduction in their wages, is not a 'strike' within the meaning of the word as commonly used. Such a withdrawal, although amounting to a strike, is not, as we have already said, either illegal or criminal." If one person can lawfully quit the service of his employer because of the rate of wages paid or the employment of objectionable persons, cannot several or many persons, first agreeing among themselves to the same purpose, likewise lawfully quit?

Conspiracy at common law was a combination between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. Where not under special contract for a definite time, a simultaneous severance of the relations between employer and employees at the instance of the employees, and where there was no preconcerted action of such employees, was never considered unlawful. Coming to the means employed, it is not unlawful for several or many employees to agree between themselves to quit their employer. As we have seen, at one time it was held to be an unlawful conspiracy for laborers to combine for the purpose of quitting simultaneously, with the ultimate purpose of raising their wages, or inducing their employer to confine his employment to certain kinds of labor, or the like; but this is not now the law, the principle underlying it having long since been discarded as inconsistent with liberty and the spirit of our free institutions. After workmen have thus combined it is still not unlawful for them, by the use of fair means,

to communicate the reasons for their design, and to signify their intention of quitting to their employer: 24 Am. & Eng. Ency. of Law, 123; *Bohn Mfg. Co. v. Hollis*, 54 Minn. 233; 40 Am. St. Rep. 319; *Walsby v. Anley*, 7 Jur., N. S., 466; *People v. Kostka*, 4 N. Y. Crim. Rep. 434; *People v. Wilzig*, 4 N. Y. Crim. Rep. 417; <sup>544</sup> *Rogers v. Evarts*, 17 N. Y. Supp. 268. Within these limits a perfectly legitimate strike may be inaugurated and maintained, the object being to better the condition of workmen. Such an object is not only legitimate and lawful, but is just and praiseworthy. It was not wrongful, therefore, for the Multnomah Typographical Union to adopt a rule limiting the number of apprentices, and seek by fair means to enforce the observance thereof, so that its purpose in that respect was lawful. The claim that a monopoly is thus being promoted surely constitutes no grounds for equitable interference by injunction. This whole controversy has arisen because of the existence of the rule referred to, and the efforts of the union to require its observance at the hands of the plaintiff. When, however, unlawful means are used to uphold or maintain a strike, or if the purposes for which it is maintained are unlawful, then it follows, as a matter of course, that the strike is in itself unlawful.

5. It is claimed in this case that the means employed by defendants were not permissible, and, being violative of the rights of plaintiff, it is entitled to an injunction to prohibit their continuance. This brings us to the gist of the controversy. The statute provides (Hill's Code, sec. 1893): "If any person shall, by force, threats, or intimidation, prevent, or endeavor to prevent, any person employed by another from continuing or performing his work, or from accepting any new work or employment; or if any person shall circulate any false written or printed matter, or be concerned in the circulation of any such matter, to induce others not to buy from or sell to or have dealings with any person, for the purpose or with the intent to prevent such person from employing any person, or to force or compel him to employ or discharge from his <sup>545</sup> employment any one, or to alter his mode of carrying on his business, or to limit or increase the number of his employees, or their rate of wages or time of service, such person shall be deemed guilty of a misdemeanor," etc; and by section 1897 it is made a misdemeanor for any person to "willfully and wrongfully commit any act which grossly injures the person or property of another, or



which grossly disturbs the public peace or health, or which openly outrages the public decency, and is injurious to public morals." Section 1748 provides: "If any person, either verbally or by any written or printed communication, shall threaten any injury to the person or property of another . . . with intent thereby to extort any pecuniary advantage or property from such other, or with intent to compel such other to do any act against his will, such person, upon conviction thereof, shall be punished," etc. All these statutes are invoked in aid of plaintiff's contention. The first clause of section 1893 is directed against any person unlawfully preventing or endeavoring to prevent any person employed by another from continuing or performing his work. There are but two instances shown by the complaint in which the employees of plaintiff quit work. As to the first of these it is alleged: "That the said executive committee, combining and conspiring as aforesaid, for the purpose aforesaid, and professing to act by authority of the union, and in the capacity of the officers of the same, without lawful business, entered the premises of the plaintiff, and ordered all members of the said union there and then at work under contract with the plaintiff to cease working further for it, under penalty of being dealt with according to the laws and regulations of said union. Said workmen were intimidated and influenced thereby, and without delay immediately obeyed said unlawful and injurious order." And as to the second instance, the complaint <sup>546</sup> alleges: "That on the twelfth day of March, 1893, the then president of said union, and its members and officers, by a resolution of said union passed on that day, maliciously, and solely because plaintiff refused to submit to the said union, ordered all union men working for plaintiff to cease working for it, and the said workmen, being intimidated by said order, did obey said order, and ceased to fulfill their contracts with plaintiff." In the one instance the men quit under an order from the executive committee, and the other in pursuance of a resolution of the union. No intimidation is specifically alleged or shown, unless it can be inferred that, by a refusal to quit, the members of the union would subject themselves to the charge of insubordination to the order, and it does not appear that there was sufficient odium attached to this to put the members in fear, or that compliance with the order and resolution was induced thereby. The more reasonable presumption is, that they quit because

of the mutual understanding between the members to abide the action of the union and its executive committee. The latter clauses of section 1893 can have no application here, as it is not alleged or claimed that the notice published in the *Oregonian* and the one posted in numerous places were false.

6. The more serious phase of this case, and the one which demands special attention, is the alleged boycott of plaintiff in its business, inaugurated for the purpose of so handicapping it as to compel submission to the rules and regulations of the union. Every person has a right to require that he be protected in his property rights. "The labor and skill of the workman, or the professional man, be it of high or low degree, the plant of a manufacturer, the equipment of a farmer, the investments of commerce, are all, in an equal sense, property. If men, by overt acts of violence, destroy either they are guilty of crime": <sup>547</sup> Ray on Contractual Limitations, 409; *State v. Stewart*, 59 Vt. 273; 59 Am. Rep. 710. Sections 1748 and 1897 of the code seem especially designed to prevent and punish acts which are grossly injurious to person or property, and attempts to compel others to do any act against their will. It seems the principle that a combination or conspiracy of two or more persons to injure the rights of others is illegal, although nothing has been done in execution of that intent, has not been embodied in our statutes, but there is no good reason why civil liabilities may not ensue by reason of a conspiracy to commit that which is made unlawful by statute. "The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together by concerted means to do that which is unlawful or criminal, to the injury of the public, or portions or classes of a community, or even to the right of an individual": *Commonwealth v. Hunt*, 4 Met. 121; 38 Am. Dec. 346. "Combinations against law or against individuals are always dangerous to the public peace and to public security": *State v. Burnham*, 15 N. H. 401. "An agreement to effect an injury or wrong to another by two or more persons is constituted an offense, because the wrong to be effected by a combination assumes a formidable character. When done by one alone it is but a civil injury, but it assumes a formidable or aggravated character when it is to be effected by the powers of the combination": *Reg. v. Parnell*, 14 Cox C. C. 514. The entire current of authority for the

last century or more is to the same effect: See *State v. Donaldson*, 32 N. J. L. 151; 90 Am. Dec. 649; *Crump v. Commonwealth*, 84 Va. 927; 10 Am. St. Rep. 895; *United States v. Kane*, 23 Fed. Rep. 748; *Callan v. Wilson*, 127 U. S. 540, 555. Powers, J., in *State v. Stewart*, 59 Vt. 286, 59 Am. Rep. 710, says: "A combination of two or more persons to effect an illegal purpose, either by legal or illegal <sup>548</sup> means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by illegal means, whether such means be illegal at common law or by statute, is a common-law conspiracy." And in *State v. Glidden*, 55 Conn. 47, 3 Am. St. Rep. 23, an indictment for conspiracy to violate a statute very similar to section 1893 of our code was sustained by the court. While conspiracy in itself is not an indictable offense under our law, all these authorities show conclusively that such a combination for the purpose of doing injury to the public or to individuals is *per se* wrongful. Civil consequences are not changed by reason of the fact that the combination is not made a statutory offense. Recent decisions sustain the doctrine that in a proper case, where two or more persons conspire and confederate together for the purpose of destroying or injuring the business of another, or doing violence to his property or property rights, and it is clearly made to appear that the injury is threatened and imminent, and will become irreparable to the suitor, an injunction will lie to restrain the conspirators: *Brace v. Evans*, 3 Ry. & Corp. L. J. 561; *Cogley on Strikes and Lockouts*, 342; *Emack v. Kane*, 34 Fed. Rep. 47; *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689; *Cœur d'Alene etc. Min. Co. v. Miners' Union*, 51 Fed. Rep. 260; *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135; *Toledo etc. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730; *Arthur v. Oakes*, 63 Fed. Rep. 327. <sup>549</sup> The case of *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, was put directly upon the ground that the acts complained of constituted a nuisance. The cases of *Brace v. Evans*, 3 Ry. & Corp. L. J. 561; *Emack v. Kane*, 34 Fed. Rep. 47; *Cœur d'Alene etc. Min. Co. v. Miners' Union*, 51 Fed. Rep. 260, and *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135, may well be taken upon the same ground. The Toledo & Ann Arbor Railway Company case went upon the ground that circuit courts of the United States have jurisdiction by a bill in equity to restrain violations of the interstate commerce law to the irreparable injury of the complainant; and *Arthur v. Oakes*, 63 Fed. Rep.

327, that any illegal combination or conspiracy upon the part of employees, which has for its object the crippling of the property in the hands of a receiver, and the embarrassment of the operation of railroads under his management, would be enjoined.

The cases principally relied upon by plaintiff to sustain the injunction in the case at bar are *Brace v. Evans*, 3 Ry. & Corp. L. J. 561, and *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135. In each of these cases the acts complained of were most aggravated and virulent. In the former case the plaintiffs were proprietors and managers of a steam laundry, with a large and lucrative business. Circulars were issued alleging abusive treatment of the employees by plaintiffs, and asking all persons to cease patronizing them. This was followed by several other circulars, similar in character, some of which had printed thereon in large letters, "Boycott Brace Brothers." A sign was placed on a building in large letters: "Headquarters Brace Brothers Boycott Committee." Men followed plaintiffs' wagons in buggies having banners attached to the harness on each side of the horse containing "Boycott Brace Brothers" in large letters. Persons visited plaintiffs' agents, and requested them to cease acting as such, and, upon their refusing to do so, circulars were distributed denouncing them, and asking the public to boycott them. Men were <sup>550</sup> posted in front of their places of business, who distributed circulars in large numbers, thereby collecting large and noisy crowds, which seriously interfered with the conduct of their business, and required the protection of the police. As a result the agents of plaintiffs resigned, and many of their customers withdrew their patronage. In the latter case the facts shown by the bill of complaint and affidavits in support of the injunction were scarcely less reprehensible. Casey, the plaintiff, was the proprietor of the *Covington Daily Commonwealth*. The boycott was directed against his paper. Notices and letters were sent everywhere to his subscribers and advertisers, requesting and demanding that they should withdraw their patronage from the *Commonwealth*. The following are only specimen extracts therefrom:

"TAKE NOTICE.

"It is requested of all who are friendly to organized labor that they buy nothing from the following firm: The Common-

*wealth* (newspaper and job office), Covington, Kentucky." "The union now appeals to all in sympathy with labor to use their influence with Mr. Casey; try to show him the error of his way, and, failing in that, to withdraw their patronage from the 'rat' or 'scab' *Commonwealth* until it is unionized." "The union will consider it a great favor for you to give up the agency of the *Commonwealth*. If you do not do so we will have to consider you the enemy of organized labor." "If you wish to retain the goodwill of labor, withdraw your advertising from the *Commonwealth*, refuse to subscribe for the sheet, and your aid in our behalf will be highly appreciated." An article in the *Union Bulletin*, the organ of the defendant union, entitled "Boycott the *Commonwealth*," which was full of such expressions as "The boycott is still on, and will be until the proprietor of that 'rat' sheet employs union men." "Withdraw your patronage from the 'scab' *Commonwealth*." "Do not patronize a merchant who advertises <sup>551</sup> in the 'rat' *Commonwealth*." "If you see the paper in any place of business, refuse to buy goods unless the manager immediately stops the 'rat' sheet." "We call upon every friend of organized labor to get his printing done in the union printing offices. Beware of that 'rat' trap at Fifth and Scott streets, Covington, Kentucky." The inevitable result of such an attack was to utterly destroy Casey's *Commonwealth*, and leave him without occupation or property of any value.

7. Has plaintiff herein brought itself within the purview of the doctrine of these cases, or, in other words, does it show such threatened and imminent injuries to its business and property as will result in its irreparable detriment and loss? The allegations of the existence of a conspiracy between the officers and members of Multnomah Typographical Union, No. 58, to compel the plaintiff to submit to the dictation of the union upon pain of being boycotted in its business must be taken as true for the purposes of the demurrer. The first overt act, as before stated, was the entry of the executive committee upon the premises of plaintiff without leave or license, and ordering the union men to cease work under penalty of being dealt with according to the laws and regulations of the union. If this was a willful aggression upon plaintiff's rights, it would constitute trespass, for which an action would lie sounding in damages. It must also be taken as true that through the willful and malicious acts of

the conspirators plaintiff lost the city printing for 1893, the Meier & Frank Company business, and will lose that of Mason, Ehrman & Co., all valuable business. These acts were committed within a space of about ten months, and constitute a grievance not to be lightly considered, but we cannot agree with counsel that plaintiff is remediless in a court of law. The direct cause of the loss of the city printing is definitely alleged, and <sup>552</sup> the cause of the loss and apprehended loss of the business of the two firms named is, perhaps, sufficiently, though argumentatively stated. In aggravation of the incident of the executive committee ordering the men to cease work it is alleged "that said committee and members of said union, further combining and conspiring to injure and force the plaintiff into their unlawful demands, circulated the facts that the said employees of the plaintiff had been called off, and ordered by them to stop work, and the plaintiff's office left without hands." But it is not shown how these facts were circulated. For all that appears it might have been by the ordinary discussion of the passing incidents of the time. Nor is it shown to whom they were communicated, whether to the patrons of plaintiff, or to other members of the union, or to any person or persons in particular. As to the second time the union employees quit, the complaint is more explicit. The fact was circulated by posting the following notice in numerous places: "Owing to the Longshore Printing Company breaking the rules of the Multnomah Typographical Union, all members of the union were withdrawn March 16, 1893." This may or may not have been detrimental to plaintiff's business, and would depend somewhat upon the state of siege existing at the time. Referring to the notice published in the *Oregonian* of August 27 and 28, 1892, it would appear that this was ominous of mischief, but the incident occurred some nine months prior to the commencement of this suit, and was not repeated. Neither of these notices however, approach the vicious character of those complained of in *Brace v. Evans*, 3 Ry. & Corp. L. J. 561, and *Casey v. Cincinnati Typographical Union*, 45 Fed. Rep. 135. While it might be inferred therefrom that a boycott was on, and that they were intended to affect injuriously the business of plaintiff, yet they were not so direct and positive, nor <sup>553</sup> so persistently and wickedly repeated and maintained, when taken in connection with the accompanying incidents, that

a court of equity could say that the injury ensuing will become irreparable unless enjoined.

8. The allegations of the complaint that "the said president and executive committee have notified plaintiff that it had resumed its work of destruction with renewed vigor and malice against it, and this time will make war on it to the knife," and "said president and committee notified plaintiff that it now intended to resume its attacks upon it, and fight it to the death," and such amplified averments as, "so the plaintiff says, that in pursuance of said unlawful combination and conspiracy, from time to time it has been unlawfully and maliciously interfered with by the said officers and members of said union in its business, and has been subjected to continual secret assaults in influence brought to bear by them in order to injure and destroy its business, and that its patrons have been continually harassed, and both impliedly and expressly threatened by them with boycott if they continued to give business to the plaintiff, and that other trade union associations have been enlisted and persuaded by said union to take part in the crusade against it. . . . The very nature of the attacks made on plaintiff render it impossible to trace them fully, or to control them. That they are insidious, made in secret, or at all events without the knowledge or presence of the plaintiff when made, and few of the instances come to its knowledge except through their injurious effects, as to which plaintiff in many cases is left to infer the cause. . . . Enough instances have come to its knowledge in which the said officers and members of said union have been pursuing their malicious, unlawful, and fraudulent course to demonstrate that it has been kept up persistently, and has been widespread in the <sup>554</sup> community for nearly all the time since the first mentioned demand about ten months ago"—cannot avail the pleader unless they are accompanied with statements of definite facts and circumstances, so that the court can arrive at the same conclusions. Except as to the few instances herein discussed it does not appear which of plaintiff's patrons have been continually or at all harassed, how they or any of them were threatened with boycott, what if any other trades union associations have been enlisted to take part in the crusade, what instances of secret attack have come to the knowledge of plaintiff, or what injurious effects they can trace directly to the defendants. The facts stated should be the approximate cause of plaintiff's injuries,

or of the apprehension of those threatened and imminent. As was said by Mitchell, J., in *Bohn Mfg. Co. v. Hollis*, 54 Minn. 233, 40 Am. St. Rep. 319, such averments and assertions "look very formidable, but in law as well as mathematics it simplifies things very much to reduce them to their lowest terms."

9. The authorities all agree that a court of equity will not hesitate to avail itself of the extraordinary process of injunction, when the circumstances of the particular case require it, in order to protect rights of property against irreparable damage done by wrongdoers. Such process, however, should be issued with great caution and circumspection. Baldwin, J., in *Bonaparte v. Camden etc. R. R. Co.*, 1 Bald. 205, Fed. Cas. 1617, says: "There is no power, the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or is more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be <sup>555</sup> clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones not coming within well-established principles, for, if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of the court, not of the party who prays for it. It will be refused till the court is satisfied that the case before them is of a right about to be destroyed, irreparably injured, or that great and lasting injury is about to be done by an illegal act. In such a case the court owes it to its own suitors and its own principles to administer the only remedy which the law allows to prevent the commission of such act." The showing of plaintiff is clearly insufficient to bring itself within the rule thus explicitly stated by the learned judge. The plaintiff may have its action at law against defendants for some of the acts complained of, and defendants, or some of them, may have by their conduct subjected themselves to a criminal prosecution under the statute, and the plaintiff may have been much annoyed, and at times viciously harassed, by defendants; yet one thing is clear, there is no such persistent, aggressive, and virulent boycott now in progress, nor was there at the time of the commencement of this suit, as to justify the court in saying



that plaintiff's business and property is being, or is about to be, destroyed or irreparably injured. We do not say that an injunction is an improper or unavailable remedy to stay the destructive and pernicious ravages of a boycott, but that in this particular case plaintiff has not brought itself within the rules of that particular jurisdiction of equity. The court below was right in sustaining the demurrer, and its decree in dismissing the complaint is affirmed.

Affirmed.

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**PLEADING.**—A demurrer admits all facts properly alleged: *Bomar v. Means*, 37 S. C. 520; 34 Am. St. Rep. 772; but it does not admit a mere conclusion based upon another conclusion, and which does not amount to an allegation of facts: *Burlington etc. Ry. Co. v. Dey*, 82 Iowa, 312; 31 Am. St. Rep. 477.

**CONSPIRACY TO CONTROL WAGES OR WORKMEN.**—Agreements or combinations are not unlawful so as to constitute conspiracies unless they are for acts or omissions, whether as ends or means, which would be unlawful apart from agreement: *Cote v. Murphy*, 159 Pa. St. 420; 39 Am. St. Rep. 686. The objects of labor and trades unions cannot be promoted by making war upon nonunion laboring men, or by illegal interference with their rights and privileges: *Lucks v. Clothing etc. Assembly*, 77 Md. 396; 39 Am. St. Rep. 421. The earlier cases on this subject are discussed in the monographic notes to *State v. Stewart*, 59 Am. Rep. 721; *People v. Fisher*, 28 Am. Dec. 507-512, on conspiracies to control wages or workmen.

**BOYCOTT—CONSPIRACY.**—Conspiracy, as commonly understood, is an agreement or combination by two or more persons to do an unlawful act, or to do a lawful act by unlawful or criminal means. This definition would probably include few of the acts popularly known as "boycotting," but the tendency of modern decisions seems to be to extend this definition, and to include combinations to effect acts indifferent in themselves, but injurious to society, if carried out by the concerted action of many: Notes to *Smith v. People*, 76 Am. Dec. 785; *People v. Richards*, 51 Am. Dec. 82. As showing how the definition has been extended, see *State v. Glidden*, 55 Conn. 46; 3 Am. St. Rep. 23; *Crump v. Commonwealth*, 84 Va. 927; 10 Am. St. Rep. 895. In the case last cited it is said that the means by which it is generally sought to accomplish a boycott are not only unlawful, but are in some degree criminal. Threats, intimidation, etc., to prevent persons from entering into, or continuing in, the employment of another are illegal: *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689.

**INJUNCTION — CONSPIRACY — BOYCOTT.** — An injunction will not issue to enjoin defendant from continuing a conspiracy not to employ complainants: *Worthington v. Waring*, 157 Mass. 421; 34 Am. St. Rep. 294. But an injunction will issue against boycotting which is accompanied by force, menaces, or threats: *Murdock v. Walker*, 152 Pa. St. 595; 34 Am. St. Rep. 678.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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**HARTMAN v. FICK.**

[67 PENNSYLVANIA STATE, 12.]

**EASEMENTS—WAYS—OBSTRUCTION.**—The owner of land, subject to a right of way, may, for the purpose of protecting his fields, erect across it a gate or other structure not unreasonably interfering with the right of passage.

TRESPASS for the removal of a gate constructed across a right of way. Plaintiff and defendant are adjoining farm-owners. Defendant acquired by prescription a right of way for farm purposes through ten acres of uninclosed woodland belonging to plaintiff. Prior to the trial plaintiff cleared this land for cultivation, and, to keep out stray animals, as well as to keep his tenant's cattle in, he erected a swinging-gate at the entrance to the way. Defendant cut down this gate, hence this action. Judgment for plaintiff. Defendant appeals.

*C. H. Ruhl and B. Y. Shearer, for the appellant.*

*A. B. Riesser, J. Snyder, and M. H. Schaffer, for the appellee.*

<sup>20</sup> **PER CURIAM.** This case was greatly simplified by what transpired in the court below at the conclusion of the trial. The plaintiff conceded the defendant's right of way over his land, and the defendant conceded in effect that the gate erected by the plaintiff across the right of way for the protection of his fields was not an unreasonable obstruction to or interference with the right of passage. This left no question undisposed of except that of the legal right of the owner of the land to protect his fields by such a gate or other struc-

ture as should not unreasonably interfere with the use of the way. The easement was only for passage. The land remained the property of the plaintiff, and he had a right to use it for any purpose that did not interfere with the easement. To do this it might be necessary, under some circumstances, to inclose the way with the field over which it passes, and, if this is done with a reasonable regard to the convenience of the owner of the easement, it affords him no just ground of complaint. The tendency of our legislation is in this direction, and such is also the fair effect of *Connery v. Brooke*, 73 Pa. St. 80.

The learned judge reached a correct conclusion and the judgment is affirmed.

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**PRIVATE WAYS—OBSTRUCTION BY OWNER OF FEE.**—Where a right of way is granted without metes or bounds or description defining its width the owner of the fee may contract the width of the way or obstruct it in any manner, so long as he does not interfere with its necessary and reasonable use for the purposes for which it was granted: *Frank v. Benesch*, 74 Md. 58; 28 Am. St. Rep. 237, and note; *Grufton v. Moir*, 130 N. Y. 485; 27 Am. St. Rep. 533, and note.

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## PENNSYLVANIA RAILROAD v. MONTGOMERY COUNTY PASSENGER RAILWAY.

[187 PENNSYLVANIA STATE, 62.]

**HIGHWAYS—ADDITIONAL SERVITUDES.**—**ELECTRIC RAILWAYS** traversing country highways without legislative consent, and connecting widely separated cities and towns, impose additional servitudes on the property fronting on the highways so occupied.

**HIGHWAYS—ADDITIONAL SERVITUDES.**—**THE CONSENT OF TOWNSHIP AUTHORITIES** justifies an entry upon a country highway so far as the public is concerned, but such authorities have no power to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township from one city or borough to another by rail is in no sense a township purpose.

**HIGHWAYS—STREET RAILWAYS—ADDITIONAL SERVITUDE.**—If township authorities give their consent to a railway company to occupy the country highways with a street railway they act as the representatives of those who build and use such railway, and not as the representatives of the owners of the private property along the highways thus occupied. The company can only protect itself in the use of such highways by contract with every property owner along roads occupied by it.

**HIGHWAYS—OCCUPATION BY STREET RAILWAY—CONSENT OF AUTHORITIES.** Township authorities should act in their official capacity at a meeting upon any application made for leave to occupy township highways with

a street railway, and their consent, as well as the terms upon which it was granted, must appear in the record of the meeting to be valid.

**HIGHWAYS—OCCUPATION BY STREET RAILWAY—ESTOPPEL.**—If a street railway has been constructed and operated at great expense over country highways without the legal consent of either the township officers or abutting owners, but without objection from them, they are estopped from demanding that the railway be torn up, or its operation enjoined.

**STREET RAILROADS—CONSENT OF AUTHORITIES NECESSARY TO CONSTRUCTION.**—A street railway company, not possessing the power of eminent domain, cannot build under its charter alone, but must have the consent of the proper municipal or local authorities, and, if the proposed line passes through a city, borough, or township intermediate the termini, and such city, borough, or township refuses permission, the power to build the road described in the charter cannot be exercised.

**BILL IN EQUITY** for an injunction to restrain the construction of a street railway on a country highway. Judgment dismissing the bill. Plaintiff appealed.

*Charles H. Stinson, D. W. Sellers, C. Henry Stinson, and W. F. Solly*, for the appellant.

*N. H. Larzelere, J. G. Johnson, and J. B. Holland*, for the appellee.

68 **WILLIAMS, J.** Our system of street passenger railways had its origin in the days of special legislation. Each company then had its own act of incorporation in which its route was described and its powers defined. These companies were confined to the cities and large towns of the state, and their cars were moved by horse-power, and were a substitute for the omnibus and other vehicles devoted to the carriage of passengers which had been previously in common use. After the adoption of the new constitution the practice of separate legislation for each company became impracticable, and in 1878 a general law was passed providing for the organization of street railway companies for the purpose of "constructing, maintaining, and operating a street railway for public use in the conveyance of passengers." No power of eminent domain was conferred on these companies, 69 but the several provisions of the act show that such railways were to be constructed upon the streets, conforming to the grade of the streets, and subject to the regulation of the municipal authorities. The act of 1876 gave to street railway companies in cities of the first class the right to "use other than animal power" in the movement of their cars. The act of May, 1878, conferred the like right upon street railway companies in cities of the second and third

classes. The general law further provided that any company organized under its provisions should maintain an office for the transaction of its business "in the city" where its railway was located. All these provisions show that the street railways contemplated by the general act of 1878 were intended for the accommodation of the crowded streets of cities, and for no other purpose. The present general law relating to these corporations was passed in 1889. It was intended to bring together the valuable provisions of several acts of assembly into one comprehensive statute, and to make some changes that experience had shown to be desirable. It authorized the incorporation of five or more persons for the purpose of "constructing, maintaining, and operating a street railway on any street or highway upon which no track is laid or authorized to be laid" under existing charters, with the privilege of occupying "any street" by any power other than by locomotive. It required the route to be set out in the application for incorporation, stating the streets and highways upon which it was to be built, and showing "the circuit of the route, the amount of the capital stock of the company," and other particulars. It required all companies incorporated under its provisions to maintain an office where the railroad was located. Section 15 provided that "no street passenger railway shall be constructed by any company incorporated under this act within the limits of any city, borough, or townships without the consent of the local authorities thereof, nor shall any street passenger railway be incorporated hereunder which shall not have a continuous route from the beginning to the end, forming a complete circuit with its own track, excepting the five hundred feet to be used under section fourteen hereof."

From these provisions we think it is apparent that the attempt now being made to convert these city conveniences into long lines of transportation connecting widely separated cities and towns by electric railways traversing country roads was not anticipated or provided for by the legislature. The failure to confer upon these companies the power of eminent domain would, if it stood alone, be sufficient to justify this conclusion. The land taken for streets in cities and boroughs is in the exclusive possession of the municipality, which may use the footway as well as the cartway for any urban servitude without further compensation to the lot-owners: *Provost v. New Chester Water Co.*, 162 Pa. St. 275;

*Reading v. Davis*, 153 Pa. St. 360; *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367. Nor does the construction of a street passenger railway upon the surface of the street impose any additional servitude upon the property fronting on the street so occupied: *Rufferty v. Central Traction Co.*, 147 Pa. St. 579; 30 Am. St. Rep. 763. But the easement acquired by the public by proceedings under the road laws is an easement for passage only. The owner is entitled to the possession of his land for all other purposes. We held therefore in *Sterling's Appeal*, 111 Pa. St. 35, 56 Am. Rep. 246, that the occupancy of a country road by a pipe line imposed an additional servitude upon the farm-owner; while in *McDevitt v. People's Nat. Gas Co.*, 160 Pa. St. 367, we held that a pipe line, laid within the limits of the street by authority of the city did not impose any additional servitude on the lotowner.

The reason for the distinction is fully stated in the opinion in the latter case. The same distinction exists, and for the same reasons, between urban and suburban property as to the right of corporations to occupy a highway for a street passenger railway. This, as will be seen by the cases cited above, is an urban servitude to which suburban property has not been subjected by law up to this time. The consent of township authorities justifies an entry upon the public road so far as the public is concerned, but the supervisors of the townships have no power to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township on their journey from one city or borough to another by rail is in no sense a township purpose; and whether these passengers make their journey in cars drawn by a locomotive over a steam railroad or in those propelled by <sup>71</sup> electricity over tracks laid upon the highways is immaterial both to taxpayers and to landowners along the route traveled except as to the adoption of one or the other of these modes of transportation may affect the township roads or the private property of citizens. When the supervisors give their consent to the occupation of the township roads by a street railway they speak as the representatives of those who build, and those who use the roads, but not as the representatives of the private property over which the roads pass. The street railway companies cannot reach the property owners either through "the local authorities" or by right of eminent domain, as the law now stands; and

it is not easy to see how such a company can protect itself in the use of country roads except by contract with every owner of property along the roads they wish to occupy.

The trouble is that the supposed needs of the country have outgrown its legislation, and an effort is now being made to adapt street railways to purposes for which they were never intended, and for which the existing legislation relating to them was not framed.

Cities and boroughs possess the necessary power over their streets to enable them to authorize their use by a street railway. Townships do not possess municipal powers, and under existing laws their control over the public roads is limited. But in this connection another interesting question suggests itself. How is the assent of "the local authorities" to be obtained in any given case, and what is the proper evidence that it has been given? The township books in the custody of the town clerk are the records of the township, and should afford evidence of the action taken by the supervisors in all matters of public importance. A paper in the pocket of a contractor or of some officer of a corporation is not the proper evidence of action by the township, or the school district. The action needed is not that of the individuals who compose the board but of the official body. Thus it was held that a contract signed by the members of the school board separately did not bind the district. The best evidence of their official action was their minutes kept by the secretary: *Wachob v. Bingham School Dist.*, 8 Phila. 568. For the same reason a contract signed by the president and secretary was held to be invalid. <sup>72</sup> It had not been acted upon by the board when in session: *School District v. Padden*, 89 Pa. St. 395. One supervisor may bind the township by an act that is ministerial in its character: *Dull v. Ridgway*, 9 Pa. St. 272; *Pottsville v. Norwegian Tp.*, 14 Pa. St. 543. Not so, however, when the act is one that requires deliberation and the exercise of judgment: *Cooper v. Lampeter Tp.*, 8 Watts, 125; *Union Tp. v. Gibbonney*, 94 Pa. St. 534; *Somerset Tp. v. Parson*, 105 Pa. St. 360. In such cases the supervisors must be together, and their action must be taken in their official character, and should appear upon the township book kept by the town clerk. If not so taken it does not bind the township, and has no validity whatever. The supervisors should consider and deliberate upon any application made to them for leave to occupy any of the township roads with a street railway.

If they decide to grant the application upon certain terms and conditions as to the manner and extent of the occupancy permitted and the extent of repairs to be required these terms should appear in the record of the meeting as well as the consent; and a contract that does not rest on such official action, properly taken by the proper officers, is utterly worthless.

But we know as matter of current history that street railways have been projected, and actually constructed, and are now in operation over country roads, where no legal consent has been obtained, and where no attention has been paid to the rights of property holders. Such railways cannot now be torn up or enjoined either by the township officers or at the instance of landowners along their routes. Where such enterprises have been allowed to proceed and the expenditure of large sums of money has been permitted it would be inequitable to correct, at this time, what was a mutual mistake under the influence of which these enterprises have been pushed to completion; but it would seem desirable that such charters should not be granted in future until the legislature has made such provision for the assessment of damages to property as shall protect the owners from the additional servitude which the construction of electric railways does certainly impose upon all adjoining owners outside of municipal boundaries.

At present an action at law is the only remedy within the reach of an injured person who has suffered a railway to be <sup>73</sup> built across his land without objection; but equity will interpose to protect him if he comes in proper time, by enjoining the construction until his damages have been paid or secured to his satisfaction.

The only remaining question raised in this case is over the right of a street railway to build any part of its line before it has the right to complete it. A steam railroad may enter upon any part of its line and commence building subject only to its duty to complete the line in accordance with its charter. The reason of this is that it is clothed with the power of eminent domain, and may enter and appropriate land regardless of the will of the owner. A street railway company, as we have seen, does not possess the power of eminent domain. It cannot build under its charter alone. It must have the consent of the proper municipal or local authorities or it cannot move. If the proposed line passes through a city, borough, or township intermediate the termini,



and that city, borough, or township, refuses its permission, the power to build the road described in the application and charter cannot be exercised. It must be possible for the company to complete its line before it has a right as against any city, borough, or township, into which its line extends, to begin work. It is not possible for such company to complete its line without the consent of the local authorities of the districts through which it passes; and where this is refused in one or more of the municipal or quasi municipal divisions through which its line runs, the building of its proposed road under its charter is an impossibility. Let us suppose, for purposes of illustration, a charter to authorize the construction of a street railway from A, through certain roads in B, C, and D, to the city of E; and that consent has been obtained from the local authorities of A, of C, and of E, but refused by the local authorities of B and D. The proposed line is thereby cut up into three wholly unconnected pieces. It is very clear that, under a charter authorizing the building of a line of road from A to E, the company could not lawfully build three distinct local roads, viz., one in A, another in C, and the third in E. The consent given by A to the construction of the line of road authorized by the charter would not estop the local authorities from objecting to the construction of a local road within its own limits. When confronted with its own <sup>74</sup> consent A could well reply "the road to which consent was given is not the road you are now building, for the building of that road has become impossible by the action of the authorities of B and D."

The learned judge of the court below said in the conclusion of his opinion, "corporations of this character are multiplying rapidly and we may assume they are demanded by the public." This is a strong reason, for meeting the questions involved in this case squarely, that the legislation needed to protect property owners against this class of corporations may be had at the same time that the powers necessary to convert what was intended as an urban convenience into a general mode of transportation are considered and conferred by the lawmakers.

In this case the defendant's line of so-called street railway extends through two boroughs, two townships, and over one county bridge over the Schuylkill river. The line and circuit of its road over the several highways to be occupied is fully set forth in its charter.

The consent of the local authorities of West Conshohocken borough and of White Marsh township were refused, that of Upper Merion township was given, that of the borough of Conshohocken was given and has since been withdrawn. Under such circumstances the building of the line of street railway described in and authorized by the charter is impossible, and the company has no right to proceed. The conclusions of the learned master were correctly drawn and the decree recommended by him should have been made.

The decree appealed from is now reversed and the record remitted with direction to the court below to make the decree recommended by the master awarding the injunction prayed for. The costs of this appeal to be paid by the appellee.

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**HIGHWAYS—STREETS RAILWAYS IN—WHETHER ADDITIONAL SERVITUDE.** If the legislature authorizes the construction and use of an electric railway on a public highway, this is not an additional servitude for which an owner of property abutting on such highway is entitled to compensation; *Green v. City etc. Ry. Co.*, 78 Md. 294; 44 Am. St. Rep. 238, and note, with the cases collected.

**MUNICIPAL CORPORATIONS—POWER TO AUTHORIZE RAILWAYS IN STREETS.** A city, although it owns the fee to its streets, may not authorize a steam railroad company to maintain its tracks in them without compensation to abutting owners specially injured thereby: *Burlington etc. R. R. Co. v. Reinhackle*, 15 Neb. 279; 48 Am. Rep. 342, and note; *Stanley v. City of Davenport*, 54 Iowa, 463; 37 Am. Rep. 216, and extended note. Where the owners of land in a city have dedicated streets for public use, retaining the fee of the soil, the municipal authorities, in the absence of express legislative authority, cannot authorize the use of such streets by a steam railway company: *Perry v. New Orleans etc. R. R. Co.*, 55 Ala. 413; 28 Am. Rep. 740, and note. See, also, *Indianapolis etc. R. R. Co. v. Hartley*, 67 Ill. 439; 16 Am. Rep. 624, and note.

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## RUPPEL v. ALLEGHENY VALLEY RAILWAY.

[167 PENNSYLVANIA STATE, 166.]

**CARRIERS—CARS FROM OTHER LINES—QUESTION FOR JURY.**—A railroad company owes the same duty of inspection of cars received from another road and run over its own lines as in respect to its own cars. Whether it has been guilty of negligence in this respect, causing delay, and whether such delay resulted in the loss complained of, is a question for the jury, if the evidence is conflicting.

**CARRIERS—NEGLIGENCE.—BILL OF LADING LIMITING DAMAGES** for loss to the value of the goods at the time and place of shipment is invalid and unavailing as against loss caused by the negligence of the carrier. In such case the measure of damages for the loss is the value of the goods at the point of destination, if accepted by the carrier for transportation on a through bill of lading and freight rate over a connecting line to the point of destination.

*G. B. Gordon and W. Scott, for the appellant.*

*W. Yost, for the appellee.*

<sup>176</sup> DEAN, J. Ruppel, the plaintiff, by wire, had consigned to him at Pittsburg, from New Orleans, a carload of potatoes; they were shipped June 4th and reached Pittsburg June 10, 1892, being about six days on the way. Before the car arrived plaintiff <sup>177</sup> had ordered its transfer to defendant's road for shipment to Buffalo, and, when it came into the yard, he, in company with two others, examined the potatoes, which were packed in barrels, and pronounced them in good condition. The same day the car was transferred to defendant's road and he, the next morning, took from defendant a bill of lading for shipment to Buffalo; the bill stated quantity, one hundred and sixty-four barrels potatoes; advance freight charge, one hundred and seventeen dollars and sixty-seven cents. It also contained this stipulation: "The amount of any loss or damage . . . shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon." On the evening of the same day, the 11th, the car was made part of a train which was started for Buffalo. About thirty miles out of Pittsburg it was discovered to have a hot box; in consequence it was sidetracked at Kittanning, forty-two miles from Pittsburg, for repairs; this was about midnight of Saturday, the 11th. The car remained at Kittanning without repairs until Monday morning, the 13th, when it was run to East Brady, twenty-three miles toward its destination, where an examination showed the brass of a journal to be broken; this was replaced in about thirty minutes. On Monday, in the evening, the car was again coupled to a train on its way to destination, and arrived at Oil City early on the next morning, Tuesday, the 14th. Here it had to be transferred to a connecting line, the Western New York & Pennsylvania, to reach destination. The inspectors of this road refused to receive it unless repaired; it was again delayed until repaired; in the afternoon of the same day it was again started for Buffalo, where it was delivered to Ruppel's agent Thursday morning, June 16th. Many of the potatoes were then found to be decayed and wholly worthless, and the remainder considerably damaged.

The plaintiff brought suit for damages, averring negligence

of defendant, in not, under the circumstances, moving the car with reasonable dispatch to destination. The court submitted the question of negligence to the jury, who found for plaintiff, and defendant appeals. There are seven assignments of error, which, in substance, embrace three questions: 1. Was there such evidence of negligence as warranted the court in submitting that question to the jury? 2. If so, was there sufficient evidence that this negligence caused the damage complained of? <sup>178</sup> 3. Was the measure of damage adopted by the court under this contract correct?

This written contract only expresses what the law implies on the part of the common carrier, namely, that goods which it accepts shall be transported with reasonable dispatch toward destination. Whether the contract has been kept is a question of fact. If there be contradictory evidence, or if the facts warrant opposite inferences, the case must go to the jury. Here it was undisputed that in the usual course of transportation this car ought to have reached Buffalo on Monday; other cars which started with it on the same train did arrive at that place on Monday; this car was delivered on Thursday, three days later; in about the same time from Pittsburg to Buffalo as from New Orleans to Pittsburg. It was not an unwarranted assumption on part of plaintiff that reasonable dispatch was the ordinary and usual time taken for the movement of such freight between those points. Appellant's counsel argues, in pressing his assignment, that there was not sufficient evidence of negligence; in his view there is, perhaps, no more accurate statement of what is reasonable dispatch than that of Pollock, C. B., in *Briddon v. Great Northern Ry. Co.*, 28 L. J. Ex., N. S., 51: "The contract was to carry the cattle to Nottingham without delay, and in a reasonable time, under ordinary circumstances." Here it is argued, under ordinary circumstances the car would have been delivered on Monday, but because of the happening of a circumstance which could not be provided against, for it could not be foreseen—a hot box—it was not delivered until Thursday. There was evidence that usually no degree of care in inspection or operation can guard against this obstruction to speedy transportation; that a car in apparently good condition as to journals and axles, and properly lubricated, will at times have a hot box. And in so far as the delay was necessary because of a hot box, which could not with ordinary care have been provided against, the

dispatch was reasonable. But then plaintiff replies to this, appellant accepted this car at Pittsburg, after it had made the trip from New Orleans, without inspection. The car inspector of defendant at East Brady, where it was repaired, testified the brass of the journal was broken, and that he thought the brass in the first place had not fitted the journal; that it was not the proper pattern. The car-repairman for defendant at Oil City <sup>179</sup> where this car had been rejected by the connecting road, testified it had also had a broken center plate and bolt, and damaged timbers. With a broken brass and the other injuries, at this distance from Pittsburg, after a journey of more than one thousand miles to Pittsburg, and no proof of inspection there, the appellee argued that it was out of repair and defective before leaving Pittsburg; that ordinary care required inspection and repair at that point, or a transfer of the potatoes to another car. It is settled "a railroad company is bound to provide cars reasonably fit for the conveyance of the goods it undertakes to carry, and that the carrier owes the same duty of inspection of cars received from another road and run over its own lines as in respect to its own cars": Wood on Railroads, sec. 430; Patterson's Railway Accident Law, 238. To the same effect are all the authorities in this country and England. Whether the cause of this hot box existed, and by reasonable inspection could have been detected in Pittsburg, was a question for the jury on the evidence. The court could not weigh it to determine the truth. Clear and full instructions were given on this point, and we see no error in the submission.

As to whether the delay resulted in the loss, the evidence on that point, though not clear, is not purely conjectural. No less than three witnesses, of experience in shipping and dealing in potatoes, testify in substance, that the condition of these when the car was opened at Buffalo, indicated that decay had commenced within two or three days. If the loss resulted from not being taken out of the car two or three days sooner, and these two or three days were beyond that reasonable time which under the circumstances the law allowed the carrier, the defendant was answerable for the loss. This question was also properly submitted to the jury on the evidence.

How is the loss to be measured? The contract stipulates that the market price of the potatoes at Pittsburg at date of shipment is to be the measure of damages. If the loss be

not attributable to the negligence of the carrier, then this condition of the contract is binding on the consignor. There is no rule of public policy which forbids it. But the verdict of the jury has determined as a fact that the loss was occasioned by the negligence of defendant. The carrier cannot by contract in this state limit his liability in case of negligence. The law <sup>180</sup> on this subject is so clearly stated by our brother Williams, and so amply vindicated by a citation of authorities, both of this country and in England, in the late case of *Willock v. Pennsylvania R. R. Co.*, 166 Pa. St. 184, 45 Am. St. Rep. 674, that repetition is unnecessary. And the general principle announced in that case is conceded by counsel for appellant, but it is argued it has no application here; this stipulation, it is urged, is not to relieve the carrier from any liability for negligence, but was adopted to avoid the uncertainty which would otherwise be incident to proper proof of loss. If this were the object of the stipulation, there is no public policy which would avoid it. The trouble with this view, however, is that the condition is palpably a limitation of or reduction on the loss of the shipper. The sole inducement to shipment of marketable commodities is the higher price at point of destination. This alone creates and stimulates international, interstate, and domestic trade. Railroads and all other common carriers would have but lean incomes if this were not so. The plain effect of it is, not alone the avoidance of inconvenience and uncertainty in the demand, but a restriction in the amount of it, a reduction in the real loss. It is therefore void.

The fact that Buffalo was not on defendant's line and that its terminus was Oil City does not, in view of this contract and the facts, fix the market price at Oil City as the measure of damages. Defendant accepted the car for transportation safely to Buffalo, and charged a through freight rate per one hundred pounds from Pittsburg to that point; it was not answerable for any default or neglect beyond its own line, but it undertook to carry safely and with reasonable dispatch on its own line, and deliver to the connecting road on the route to destination. The verdict of the jury finds it did not carry with reasonable dispatch on its own line towards destination, and that this caused the damage sustained at Buffalo; the loss there is therefore the measure of damages. *Pennsylvania R. R. Co. v. Titusville Plank Road Co.*, 71 Pa. St. 850, cited and relied on by appellant, is clearly distinguishable

from this case. The contract averred there on part of the company was to carry the lumber from sidings on its own road to Corry, at the end of it; from whence it was to be transported by the Oil Creek Railroad to Titusville, twenty-six miles farther. The plaintiffs did not claim there was any agreement, <sup>181</sup> express or implied, to forward the lumber by delivery to a connecting road, but only that defendant was bound to transport to Corry; and further averred failure in this particular as the cause of the damage, and then that the measure of the damage was the loss at Titusville. Having that contract in view, this court said: "What then ought to be the measure of damages on the failure of duty of the railroad company to transport to Corry? The rule is compensation; such damage as might reasonably have been anticipated, and within view of the parties."

In this case the shipment is by the bill of lading from Pittsburg to Buffalo on a through rate; Oil City is not mentioned. This question now raised does not seem to have occurred to appellant at the trial in the court below; there was no evidence concerning it, and it was not mentioned in the written points. The only instruction asked on the subject in this particular is in defendant's third point, thus: "The measure of damages in this case is the market value of the potatoes at the time and place of shipment, and the freight paid to Buffalo, less the amount received for the potatoes at Buffalo."

This the court affirmed, unless the loss resulted from the negligence of defendant, in which case the Buffalo market would determine the measure of damages. But even if it had been raised by a prayer on part of appellant for special instructions, under this contract, and "what reasonably might have been anticipated, and within view of the parties," it ought not to have been affirmed.

What we have said disposes of all the assignments of error demanding notice.

The judgment is affirmed.

MITCHELL, J., dissents from so much of this opinion as relates to the measure of damages.

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**RAILROADS—LIABILITY WHEN USING CARS OF ANOTHER COMPANY.**—A railroad using the cars of a connecting line is liable to the same extent as if they were its own, if such cars when received and used were in a dangerous condition: *Reynolds v. Boston etc. R. R. Co.*, 64 Vt. 66; 33 Am. St. Rep.

908, and note. If one railway company receives the cars of another for transportation it is the duty of the former to make a careful inspection of their condition such as an ordinarily prudent man engaged in such a business would make for the safety of employees employed to handle such cars: *Louisville etc. R. R. Co. v. Williams*, 95 Ky. 199; 44 Am. St. Rep. 214, and note.

**CARRIERS—LIMITING LIABILITY FOR LOSS CAUSED BY NEGLIGENCE—MEASURE OF LIABILITY.**—The loss of goods by a common carrier is presumed to have resulted from his negligence in the absence of any evidence as to how it occurred. In such a case the carrier is liable for the full value of the goods so lost, irrespective of a contract attempting to limit his liability without regard to the actual value of the property: *Georgia R. R. etc. Co. v. Keener*, 93 Ga. 808; 44 Am. St. Rep. 197, and note.

## WAGNER v. CROOK.

[167 PENNSYLVANIA STATE, 239.]

**BANKS AND BANKING—NEGLECT OF COLLECTING BANK.**—If a bank, upon receiving a check from the payee for collection, sends it direct to the bank against which it is drawn, and the latter, although having sufficient funds of the drawer at the time it is received to pay it, neglects to do so, and subsequently fails before payment is made, the negligence of the collecting bank in so sending the check is such as to prevent any recovery by the payee against the drawer. The fact that the latter, through misrepresentations by the former, sends him a duplicate check, does not change the legal rights of the parties.

**BANKS AND BANKING—COLLECTIONS—NEGLECT.**—A bank intrusted with negotiable paper for collection must have it presented to the drawee for payment by a suitable agent who must be some party other than the drawee. A failure on the part of the collecting bank to perform this duty is negligence, for which, as between the drawer and payee, the latter must suffer.

The opinion of the trial judge, so far as pertinent, was as follows:

"October 1, 1889, defendant was indebted to plaintiffs in the sum of one hundred and forty dollars. On that day he sent his check for that amount drawn upon Summers & Hayden, bankers, doing business at New Milford, Pennsylvania, to plaintiffs by mail directed to their place of business, Grand Rapids, Michigan. This check was received by plaintiffs, October 3, 1889, and same day deposited in a bank for collection. This check passed in the usual course of collection to the Girard National Bank of Philadelphia, October 8, 1889. Same day the Girard National Bank sent this check by mail directly to the drawees, Summers & Hayden, for collection. Said Summers & Hayden received it in due



course of mail October 9, 1889, during business hours, at their banking house in New Milford, Pennsylvania.

"Said Summers & Hayden, upon receipt of this check, laid it aside, neither charging it to the account of defendant, nor protesting it, nor sending the check or the amount of it to the Girard National Bank.

"December 16, 1889, Summers & Hayden made an assignment for the benefit of their creditors, and plaintiffs have never received any money upon said check, or from the defendant, upon the original indebtedness. At the time the defendant sent this check to plaintiffs he had more than sufficient money upon deposit with Summers & Hayden, subject to check, to pay this check, which remained upon deposit with them, subject to this check, up to their failure December 16, 1889, and defendant has never received or demanded the same from Summers & Hayden or their assignee, and the reason of the nonpayment of this check was the negligence of Summers & Hayden.

"November 4, 1889, plaintiffs wrote defendant as follows:

"*L. B. Crook, Hallstead, Pa.,*

"DEAR SIR: Your check, \$140.00, to us on account was deposited in the Fourth National Bank, who forwarded the same to their correspondents. It seems that it was lost in the mails, and the bank now wish to procure a duplicate. Will you please forward the same to us or the bank as desired? We inclose the letter from the Fourth National Bank, requesting as above.

[sgd.]

"G. N. WAGNER & BROTHER."

"December 14, 1889, plaintiffs wrote defendant as follows:

"*L. B. Crook, Hallstead, Pa.,*

"DEAR SIR: Some time ago the bank requested us to ask you for duplicate check which you sent us on account car of shingles. The check was \$140.00 on Summers & Hayden, New Milford, Pa. Our bankers have called on us again for same. Will you kindly favor us with duplicate, and oblige,

[sgd.]

"G. N. WAGNER & BROTHER."

"These letters were mailed the day they were written, and received by defendant each two days thereafter. Defendant, soon after receiving the last letter, sent a duplicate check to plaintiffs.

"Summers & Hayden closed their place of business and

made an assignment before this last check could have been presented for payment at their bank in the usual course of collections.

"The holder of a bank check assumes the duty of presenting it to the bank upon which it is drawn, and demanding payment of it within a reasonable time, and if he neglects so to do, and the bank fails after the time within which it ought to have been presented, the loss is to be borne by the holder, by reason of his negligence which occasioned the loss: *McIntyre v. Kennedy*, 29 Pa. St. 448; *Kilpatrick v. Building and Loan Assn.*, 119 Pa. St. 30.

"It was admitted upon the argument that this check was presented in due time at the banking house of the drawees, Summers & Hayden, but it was claimed that the holder, by his agent, the Girard National Bank of Philadelphia, was negligent in sending this check by mail directly to the drawees, Summers & Hayden; that by so doing they made Summers & Hayden their agent, and became responsible for the admitted negligence of Summers & Hayden in not paying the check from funds of the drawer in their hands for that purpose.

"In the case of *Merchants' National Bank of Philadelphia v. Goodman*, 109 Pa. St. 422, 58 Am. Rep. 728, Harrington & Goodman deposited with the Merchants' National Bank of Philadelphia a check drawn by Ruhman & Co. on the Mississippi Valley Bank, doing business at Vicksburg, Mississippi, for four hundred and eighty-nine dollars and twenty cents. The same day the Merchants' Bank remitted this check by letter directly to the drawees, the Mississippi Valley Bank, requesting payment. The cashier of Mississippi Valley Bank mailed to the Merchants' Bank a letter inclosing in payment of this check a draft of the Mississippi Valley Bank upon the Hanover National Bank of New York city to the order of cashier Merchants' Bank for the amount of the check. The Mississippi Valley Bank was doing business at the time this draft was sent, but failed a few days after, and the draft drawn by them on the Hanover National Bank was not paid. The check sent by Merchants' Bank to Mississippi Valley Bank was by the Valley bank charged to drawers' account, and canceled when draft on Hanover National Bank was sent to Merchants' Bank.

"Harrington & Goodman brought suit against the Merchants' Bank for amount of check deposited for collection,

Merchants' Bank having charged the amount of the check back to their account upon notice of nonpayment of the draft.

"The case was submitted upon a statement of facts, and judgment entered for Harrington & Goodman. Allison, P. J., wrote an elaborate opinion, in which he reviewed all the authorities upon the question at issue. The case was carried to the supreme court, and affirmed upon the opinion of Judge Allison. In his opinion Judge Allison sums up the principles which governed the case as follows:

"The weight of authority predominates greatly in support of the doctrine that it was the duty of the defendant to transmit to a suitable agent to collect, and it seems to us that the Mississippi Valley Bank, on whom the check was drawn, was in no sense a suitable agent to demand payment against itself; its interest was plainly to delay, instead of speeding, payment. The defendant put it in the power of the Mississippi Valley Bank to do what it pleased with the check, and that which it did please to do, on the eve of insolvency, was to cancel and surrender the check, and to transmit, not money, but a worthless draft in payment.

"We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of another, a claim against itself.

"The only safe rule is to hold that an agent with whom a check or bill is deposited for collection must transmit to a suitable subagent to demand payment in such manner that no loss can happen to any party, whether he be depositor and indorser or the indorsee and holder. In this instance, had the demand for payment been made by such agent, the amount of the check would have been collected over the counter of the Mississippi Valley Bank. It was doing business on the nineteenth day of November, 1883, and the cancellation of the check on that day shows there was money of the drawer in bank sufficient to pay the check.

"We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent to mean that such suitable agent must, from the nature of the case, be some other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone, or defeat payment.

This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions shall be given, which will save the collecting bank from all risk or peril.'

"As regards the liability of the Girard National Bank to the plaintiffs, this case of *Hurrington v. Merchants' National Bank* rules the question; the cancellation of the check and sending of a worthless draft in payment of it is no worse a breach of duty or negligence than keeping possession of the check and neglecting or refusing to notify the sender of its reception, and the Girard National Bank, under the facts in this case stated, would be liable to the plaintiffs for the amount of the check, lost by their negligence in transmitting it to Summers & Hayden, the payees of the same for collection, Summers & Hayden having money on deposit with them belonging to the drawer to pay the same, but instead of paying the check they retaining the same.

"As between the maker and the payee of this check the Girard National Bank was the agent of the payee, and the negligence of the bank in sending the check to Summers & Hayden for collection instead of to a suitable agent, was the negligence of the payee, and the loss of the amount of the check was therefore caused by this negligence of the payee.

"It has been held that the neglect of the payee of a check to cause the same to be presented to the drawee for payment within a reasonable time, where the check has been given to apply upon a debt of the maker, and a loss is occasioned by such neglect, converts the acceptance of the check, from a conditional payment of the indebtedness into an absolute payment of the same. The rule rests upon the loss occasioned by the neglect of the payee to use due diligence.

"I have been unable to find any case exactly in point; but cannot draw a distinction between a loss occasioned by neglect to use due diligence in transmitting for collection, and a loss occasioned by a neglect to perform the equally essential duty of having the check presented to the drawee for payment by a suitable agent.

"The sending of a duplicate check, under the circumstances of this case, cannot affect the status of the parties; the check was sent upon representation which proved to be untrue, and would not have been given had the actual facts been known.

"Judgment is therefore directed to be entered for the defendant."

*Edson W. Safford*, for the appellant.

*Miller S. Allen*, for the appellee.

**364** Per CURIAM. This appeal is from the judgment entered in favor of the defendant on the case stated. All that need be said in vindication of the correctness of the judgment will be found in the opinion of the learned president of the court below. For reasons given by him the judgment was rightly entered, and should not be disturbed.

Judgment affirmed.

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**BANKS—COLLECTIONS—NEGLIGENCE.**—A bank receiving for collection a check or certificate of deposit on a bank at another place and intrusting it directly to that bank for payment is liable to the depositor for loss by the failure of the drawee: *Merchants' Nat. Bank v. Goodman*, 109 Pa. St. 422; 58 Am. Rep. 728, and note; *German Nat. Bank v. Burns*, 12 Col. 539; 13 Am. St. Rep. 247, and note. The general question as to the liability of a bank for the negligence of its agent for collection is treated in the extended notes to *Isham v. Post*, 38 Am. St. Rep. 775, 777; *First Nat. Bank v. Strauss*, 14 Am. St. Rep. 583, and *Allen v. Merchants' Bank*, 34 Am. Dec. 807.

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## PILE v. PEDRICK.

[167 PENNSYLVANIA STATE, 296.]

**MANDATORY INJUNCTIONS—REMOVAL OF WALL.**—If a party intending to build a wall entirely upon his own land, through a mistaken survey builds it so that its foundation encroaches slightly upon the land of an adjoining owner, without any encroachment above the surface, the wall is not a party-wall, and, upon the refusal of such adjoining owner to allow an entry upon his land by the builder for the purpose of removing the projecting foundation, the latter may be compelled by mandatory injunction to remove it from that side of the wall upon his own land.

**COSTS ARE NOT MATTER OF RIGHT IN EQUITY**, but may be awarded or withheld in the discretion of the chancellor.

*E. H. Hanson and J. M. Pile*, for appellant Pile and others.

*L. Melick and J. Sparhawk*, for appellant Pedrick and others.

### PILE'S APPEAL.

**369** **WILLIAMS, J.** The learned judge of the court below was right in holding that the wall in controversy was not a party-wall. It was not intended to be. The defendants were building a factory, and, under the advice of their architect, decided to build within their own lines in order to avoid the danger of injury to others from vibration which might result

from the use of their machinery. They called upon the district surveyor to locate their line, and built within it as so ascertained. Subsequent surveys by city surveyors have determined that the line was not accurately located at first, but was about one and a half inches over on the plaintiffs. This leaves the ends of the stones used in the foundation wall projecting into the plaintiffs' lands below the surface one and three-eighths inches. This unintentional intrusion into the plaintiffs' close is the narrow foundation on which this bill in equity rests. The wall resting on the stone foundation is conceded to be within the defendants' line. The defendants offered nevertheless to make it a party-wall by agreement, and give to plaintiffs free use of it, as such, on condition that the windows on the third and fourth floors should remain open <sup>300</sup> until the plaintiff should desire to use the wall. This offer was declined. The trespass was then to be remedied in one of two ways. It could be treated, with the plaintiffs' consent, as a permanent trespass, and compensated for in damages, or the defendants could be compelled to remove the offending ends of the stones to the other side of the line. The plaintiffs insisted upon the latter course, and the court below has, by its decree, ordered that this should be done. The defendants then sought permission to go on the plaintiffs' side of the line and chip off the projecting ends, offering to pay for all inconvenience or injury the plaintiffs or their tenants might suffer by their so doing. This they refused. Nothing remained but to take down and rebuild the entire wall from the defendants' side and with their building resting on it. This the decree requires, but, in view of the course of the litigation, the learned judge divided the costs. This is the chief ground of complaint on this appeal. Costs are not of course in equity. They may be given or withheld as equity and good conscience require. It often happens that a chancellor is constrained to enforce a legal right under circumstances that involve hardship to the defendant, and in such cases it is, as it should be, common to dispose of the costs upon a consideration of all the circumstances and the position and conduct of the parties. The costs in this case were within the power of the chancellor. They were disposed of in the exercise of his official discretion, and we see no reason to doubt that they were disposed of properly. The decree is affirmed. The costs of this appeal to be paid by the appellant.

## PEDRICK'S APPEAL.

**WILLIAMS, J.** This is an appeal from the same decree just considered on the appeal of J. M. Pile et al. It is not denied that the foundation wall on which the appellant has built was located under a mistake made by the district surveyor, and does in fact project slightly into the plaintiffs' land. For one inch and three-eighths the ends of the stones in the wall are said to project beyond the division line. The defendants have no right at law or in equity to occupy land that does not belong to them, and we do not see how the court below could have done otherwise than recognize and act upon this principle. They must remove <sup>301</sup> their wall so that it shall be upon their land. This the court directed should be done within a reasonable time. To avoid further controversy over this subject we will so far modify the decree as to permit such removal to be made within one year from the date of filing hereof. In all other respects the decree is affirmed. The appellants to pay all costs made by them upon this appeal.

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**INJUNCTIONS—MANDATORY—REMOVAL OF OBSTRUCTIONS.**—A mandatory injunction may issue at the suit of a city to compel a lotowner therein to remove his buildings which encroach upon or obstruct a public street: *City of Eau Claire v. Matzke*, 86 Wis. 291; 39 Am. St. Rep. 900, and note. A mandatory injunction may issue to compel the removal of a dam erected across the outlet of a lake, whereby the flow of the waters is retarded and the land of the complainant overflowed: *Troe v. Larson*, 84 Iowa, 649; 35 Am. St. Rep. 336, and note.

**COSTS IN EQUITY—DISCRETION OF COURT.**—The allowance or disallowance of costs in suits in equity is discretionary with the court: *Cowles v. Whitman*, 10 Conn. 121; 25 Am. Dec. 60; *Pearce v. Chastain*, 3 Ga. 226; 46 Am. Dec. 423; *Blue v. Blue*, 38 Ill. 9; 87 Am. Dec. 267, and note. In respect to costs, the decision of the chancellor will not usually be interfered with on appeal: *Sanborn v. Kittredge*, 20 Vt. 632; 50 Am. Dec. 58. See the extended note to *Saunders v. Frost*, 16 Am. Dec. 405.

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## WHEELER v. PIERCE.

[167 PENNSYLVANIA STATE, 416.]

**MECHANICS' LIENS—CHARACTER OF STRUCTURE SUBJECT TO.**—A substantial and costly structure standing on its own stone foundation and built of brick to a height of twenty feet, though not entirely covered, inclosing a battery of boilers, and performing the function of a building as to such boilers, and constituting a part of the boiler plant which is separate and independent from an older boiler plant, except that its water and steam connections are made with the same pipes which make like connections with the old plant, but which are independent of and can be used without the old plant connections, is a building and can be sub-

jected to a mechanic's lien, and is not such an addition, alteration, or repair as requires notice to be given of an intention to file such lien.

**MECHANIC'S LIENS — CHARACTER OF STRUCTURE SUBJECT TO.**—If a structure is of a substantial and permanent character and may, in any reasonable sense, be known as a building, it may be incumbered by a mechanic's lien.

THE opinion of the trial court was as follows:

"The principles applicable to both the pending motions are so far identical that they may be considered together.

"The learned counsel for defendants contend that the opinion filed by the court, refusing their motion to strike off the lien, shows a misapprehension of the character of the erection against which the lien is filed.

"A comparison of defendants' affidavit of defense with the lien as amended shows that the parties do not differ as to the material facts in detail, but they draw opposite conclusions from those facts; the defendants alleging that the description shows the erection in question to be the repair, alteration, or addition to a house or other building, within the meaning of the act May 18, 1887, Public Laws, 118. What character is to be attributed to the structure, viewed with reference to our mechanics' lien laws, is a mixed question of law and fact. The facts being undisputed, it becomes a question of law: *Patterson v. Frazier*, 123 Pa. St. 414.

"The undisputed facts are as follows: The defendants own a piece of land, containing about eleven acres, situate in the borough of Sharpsville, Mercer County, Pennsylvania. About ten years ago defendants constructed on said land a blast furnace plant, consisting of stockhouse, casting-house, hot blasts, engine-house, two systems of boilers, one on each side of the engine-house, near but not contiguous to it, offices, shops, and other structures, all of which are located as compactly together as practicable for the manufacture of pig iron, but are not inclosed by the same walls, nor covered by the same roof.

"After said plant had been completed and operated for a number of years, to wit: between November 5, 1891, and January 27, 1892, the plaintiff, at the instance of defendants, erected and constructed on defendants' said land one of 'Wheeler's Patent Improved Boiler Furnaces,' and one battery of 'Wheeler's Water Tube Boilers.' This structure consists of a stone foundation, commenced below the surface of the ground, on which the furnace is erected, having brick walls, with doors and other openings to the fire, heating-



chambers, and other compartments within; the patent boilers being immediately above said furnace, and said brick walls extending to the top of the boilers and supporting a brick arch, which, with the top of the upper tier of boilers, forms the only covering the structure has. There is thus formed a rectangular structure thirteen and two-tenths feet by sixteen and nine-tenths feet, which is twenty feet high from the top of the stone foundation to the top of the brickwork. But above the brickwork and boilers are the steam drums, and above all are iron stacks about twenty feet in height, making a total height from the top of the foundation to the top of the stacks of about forty feet. The space within the wall is fully occupied by the furnace and boilers.

"This structure is located in close proximity to one of the old batteries of boilers, the stone foundation of the new structure abutting against the foundation supporting the old boilers. The distance between the walls surrounding the new and the main walls surrounding the old boilers is three and two-tenths feet, but there is a projection from the old wall which is within six inches of the new.

"The new and the old boilers are both connected to the same pipes for water supply and for carrying steam to the engines of said furnace; and the old as well as the new do furnish steam for said engines; but the two systems are independent of each other, and the new are designed ultimately to take the place of the old boilers.

"The new structure was erected as a part of defendants' furnace plant, and was designed to be used in connection with the other buildings, apparatus, and machinery constituting said plant in the manufacture of pig iron.

"It thus appears that the structure in question is new throughout; that it is permanent and substantial; that it is not incorporated with, or attached to, any other foundation or structure; but stands on its own foundation, and has its own separate walls and covering, and that it, and the machinery and fixtures embodied in it, are a part of defendants' iron works.

"The nature and peculiar form of this furnace and boiler-house do not give ground for objection to plaintiff's lien. Such structures are buildings within the meaning of the act of June 16, 1836: *Short v. Miller*, 120 Pa. St. 470, 475, 476; *Short v. Ames*, 121 Pa. St. 530, 536; *Titusville Iron Works v.*

*Keystone Oil Co.*, 130 Pa. St. 211, 221; *Linden Steel Co. v. Imperial Refining Co.*, 138 Pa. St. 10.

"In considering the decisions of our supreme court, in order to determine the validity of a lien against the structure, located as it is with reference to other buildings, and embraced as it is in defendants' works, it must be borne in mind that the act of 1836, to which those decisions relate, secures a lien where the work done, or material furnished, was in the erection or construction of new buildings only: *In re Howett, Landis' Appeal*, 10 Pa. St. 379; *Miller v. Hershey*, 59 Pa. St. 64; *Long v. McLanahan*, 103 Pa. St. 537, 541; *Patterson v. Frazier*, 123 Pa. St. 414.

"There is a class of cases which speak of substantial additions of material parts, and which sustain the proposition that it is not requisite that the building should be new throughout; but that if there has been a rebuilding, incorporating the old structure, or a part of it, with substantial additions of material parts, and there have been such alterations in the external form as would constitute a new building in common parlance, then the act of 1836 secures a lien, for work done or material furnished, against the whole structure: *Driesbach v. Keller*, 2 Pa. St. 77; *Armstrong v. Ware*, 20 Pa. St. 519; *Nelson v. Campbell*, 28 Pa. St. 156; *Hershey v. Shenk*, 58 Pa. St. 382; *Miller v. Hershey*, 59 Pa. St. 64. But the *ratio decidendi* of this line of cases is not that the substantial additions of material parts gave the lien; but that the lien was valid, because the building was, in fact and in law, new. Thus, in *Driesbach v. Keller*, 2 Pa. St. 79, the question at issue is stated in the following words: 'The lien given by law to the mechanic is for work done in the erection of a building, and the question is whether it is to be legally considered as the erection of a building, or as merely the repair of an old one, to which no lien is given.' In *Armstrong v. Ware*, 20 Pa. St. 520, the point is stated thus: 'The law gives a lien to mechanics on every building erected, but not for adding to or altering an old building.' In *Hershey v. Shenk*, 58 Pa. St. 384, after quoting the instruction of the lower court assigned as error, Mr. Justice Sharswood construed the proposition to be 'if the jury believed these facts to have been substantiated by the evidence, it was in point of law a new erection.'

"There is another line of cases wherein liens were held valid under the act of 1836, when filed against new buildings erected near to but separate from old buildings, where the

new and the old are parts of one plant, and all are designed to be used for a common purpose. Such are *Parrish's Appeal*, 83 Pa. St. 111, and *Girard Point Storage Co. v. Southwark Foundry Co.*, 105 Pa. St. 248.

"In both of those cases the liens in question were filed against the new structures only. Had they been filed against all the buildings standing on the same lot and connected by a common purpose the liens would have been invalid: *Wigton's Appeal*, 28 Pa. St. 161, 163; *Miller v. Hershey*, 59 Pa. St. 65, 69; *Long v. McLanahan*, 103 Pa. St. 537. It is true one part of the opinion in *Parrish's Appeal*, 83 Pa. St. 111, concludes that the buildings in question were 'additions of material parts.' But we do not understand what was there said to mean that those buildings were to be regarded as an addition to any other building, for the fact was clear that no other building was increased, extended, enlarged, augmented, or in any manner changed in outward appearance by them. The expression occurs in pointing out the difference between the buildings in question and ordinary outhouses appurtenant to a dwelling-house, and the import of the argument in which the expression referred to occurs is that, if it were true that some out-buildings appurtenant to dwellings were too insignificant to support a mechanic's lien, yet the buildings in question were not of that character, but were material parts added, not to another building, but to the iron works as a whole. In other words, that they were sufficiently permanent, substantial, and material to support the liens filed against them. But if there is any ambiguity in that part of the opinion in *Parrish's Appeal*, 83 Pa. St. 123, 124, there can be no doubt that it was held in *Girard Storage Co. v. Southwark Co.*, 105 Pa. St. 248, that a lien filed against buildings which with other buildings formed one plant, and all essential for a common purpose, was valid.

"There is still another class of cases wherein liens have been sustained under the act of 1836 for work done and material furnished in the erection of a kitchen, wing, or other appendage to an old building. To this class belong *Lightfoot v. Krug*, 35 Pa. 348; *Pretz's Appeal*, 35 Pa. 349; *Harman v. Cummings*, 43 Pa. St. 322.

"There is a marked difference between the relation such an appendage bears to the old building and that between separate buildings of the same plant. In the former the parts not only show a common end, but they coalesce into

the same building; while in the latter the end is common but the buildings are distinct. There is a plain difference between adding a wing to an old building and reconstructing it, as contemplated in the first class of cases cited above. In the former instance the wing is subordinate to the main building, which stands unchanged in outward form; while in the latter the old part is subordinate to a new design, and is used only as convenient material in the erection of another building.

"It is true the opinions delivered in these three classes of cases held them all to be governed by the same principle. But that principle, as we think has been shown, was not that the liens were valid because filed against additions of material parts; but that they were valid because the structures in question were, in fact and in law, new buildings.

"It is also true that subsequent decisions hold that the facts in such cases as belong to the third class do not show a new building, within the meaning of the act of June 16, 1836, but are additions within the meaning of the act of May 18, 1887: Public Laws, 118. See *Best v. Baumgardner*, 122 Pa. St. 17; *Thomas v. Hinkle*, 126 Pa. St. 478; *Groeziuger v. Ostheim*, 135 Pa. St. 604. Those decisions, however, do not affect cases belonging to the first or second classes, which differ so clearly and materially in their facts from the third.

"The facts presented by the case at bar require it to be judged by the criterion of the second class.

"In such cases the question cannot be whether the new structure is an addition, alteration, or repair of another, because it does not increase, change, or improve either the outside or the inside of any other structure. It is not incorporated with or united to any other. The question in such cases, as we understand, is, whether the new structure, standing distinct from any other, is sufficiently permanent and substantial, and is of a nature to be called a building within the meaning of the act of 1836.

"The structure against which plaintiff's lien is filed is both permanent and substantial. That it is of a nature to be called a building has been determined in *Short v. Miller*, 120 Pa. St. 470, and other similar cases, *supra*. It follows, therefore, that the lien is valid under act of 1836.

"This conclusion makes it unnecessary to discuss the effect of the act of April 21, 1856, Public Laws, 496, or the constitutionality of the act of May 18, 1887.

"And now the defendants' motion to strike off the plaintiff's lien is refused, and it is considered and adjudged that judgment be entered in favor of plaintiff and against defendants for want of a sufficient affidavit of defense for the amount of plaintiff's claim and costs. The sum to be liquidated by the prothonotary."

*E. S. Templeton and Thomas Tanner*, for the appellant.

*A. W. Williams*, for the appellee.

<sup>424</sup> GREEN, J. We agree with the opinion of the learned court below, which contains a full exposition and classification of the decisions applicable to this class of cases, and only add some matters in response to the contention of the appellants. The battery of boilers in question is completely within a structure which is an independent erection, standing on its own stone foundations, and built of brick, in size thirteen and two-tenths feet by sixteen and nine-tenths feet, and twenty feet high. While the exterior structure is an essential part of the boiler plant itself, <sup>425</sup> forming the sides of the fire-chambers, inclosing and sustaining the boilers in position, and sustaining also the steam drums at the top, over the boilers, yet it is a substantial and costly structure performing the function of a building as to the boilers, as well as constituting a part of the boiler plant. While its water and steam connections are made with the same pipes with which the water and steam pipes of the old boilers are connected, these connections are independent of the old plant and can be used without them.

It is true there is no building erected around and over the boiler plant to protect it from the weather. But upon that subject, in *Short v. Miller*, 120 Pa. St. 470, we said, Paxson, J: "The act of assembly does not designate the character of the buildings to which a mechanic's lien may attach. . . . Nor are we embarrassed with the question whether buildings of any description are essential to an oil refinery. An engine and boiler for any kind of a manufactory do not absolutely require a building to protect them. Both may stand in the open air, yet no one doubts that, if an engine and boiler-house are erected to protect them from the weather, a lien will attach for labor and materials used in their construction. Nor have we any doubt that the lien attached to the building in this case."

In *Short v. Ames*, 121 Pa. St. 530, which was a claim of lien upon an oil refinery, Mr. Justice Clark, delivering the opinion, said: "The act of June 16, 1836, as we said in that case, does not designate the character or kind of a building to which a mechanic's lien will attach; if the structures are of a substantial and permanent character, and may, in any reasonable sense, be known as buildings, they may be incumbered by lien."

The case of *Parrish's Appeal*, 83 Pa. St. 111, is so similar in its facts to the case at bar that we think it controls the present contention. The property was an old furnace plant which had been in use for a number of years, just as this, and its owners, desiring to increase its power, contracted for a new engine, a new set of boilers, drumheads, and fixtures, and for a boiler-stack, all of which were constructed, but by different contractors. We held that these improvements were substantial additions to the old buildings for permanent purposes, made at a heavy cost, and so connected with the original <sup>426</sup> structure as to be as available and direct as if they had been originally built, and that they were the subject of mechanics' liens under the act of June 16, 1836, and that they could also be sustained under the act of April 21, 1856. In considering the subject of the boilers Mr. Justice Woodward, delivering the opinion, said: "The foundations of the boilers were seven walls, each sixty-seven feet long, from eighteen inches to two feet thick, and from two to three and a half feet high. Brick walls were built on the stone foundations to the height of six feet, extending nearly to the tops of the boilers and inclosing them. . . . That such machinery as was furnished here was of a kind for which, in the ordinary case of an erection, a lien could be supported, is well established. A lien was sustained for a copper boiler in a brew-house in *Gray v. Holdship*, 17 Serg. & R. 413; 17 Am. Dec. 680; an engine by which a sawmill was propelled, in *Morgan v. Arthurs*, 3 Watts, 140; and for burr millstones in *Wademan v. Thorp*, 5 Watts, 115. . . . The engine-house and boiler-house became parts of the furnace the moment they were completed. They were connected with it by blast pipes and flues, and the connection was as available, essential, and direct as if they had been built beside the furnace walls. In the language of the decisions they were 'additions of material parts' to the original structure. They served in their actual use all the purposes that actual additions would have

served, and their extent and value were significant enough to give ample notice to purchasers and creditors of the change in the character of the property. The decision of the auditor and the decree of the court below in support of these liens under the provisions of the act of the 16th of June, 1836, were not only in accordance with the general principles deducible from the cases that have been collected but vindicated by the very rules which those cases have established."

The only difference between the structure in that case and in this is the fact that a frame boiler-house was erected over and around it so as to protect it from the weather, but the decision was not based upon that circumstance, nor could it be, considering the reasons assigned for the ruling.

The contention now made for the appellants, that, since the passage of the act of 1887, this kind of construction must be regarded as an addition, alteration, or repair, and therefore as <sup>427</sup> being subject to that act which requires notice to be given of an intention to file a lien, is not well taken. As was held in *Parrish's Appeal*, 83 Pa. St. 111, the lien could be sustained under the act of 1856 which gave a lien for machinery, and that act did not require any notice. As between the acts of 1856 and 1887 we think it quite clear that the structure in this case must be regarded as provided for by the act of 1856, in contrast with the act of 1887, for the reason that the act of 1856 is directly applicable to machinery as such, whereas the act of 1887 provides that the act of 1836 and its supplements shall be held and taken thereafter to apply to work done and materials furnished for or about the repairs, alterations, or additions to any house or building. We think this must be held to apply to such work or materials as are done or furnished for repairs, alterations, or additions, which were not reached by the acts of 1836 and 1856. If the remedy under those acts obtained, it was without the restraining or qualifying conditions imposed by the act of 1887, and, in any given case, if the structures were subject to lien under the former acts as original erections, but, because of their character, could be embraced by the act of 1887, the remedy would be diminished rather than expanded by the application of that act. This act is an enlarging and enabling one, intended to embrace cases not within the purview of the previous legislation; but, if it is extended to cases which were within such purview, the remedy available under the pre-existing legislation would be no longer available in

its entirety, and, as to all such cases, the act of 1887 would become a restraining instead of an enlarging act. We think such a result would be inconsistent with the manifest purpose of the act.

It is true that in the case of *Thomas v. Hinkle*, 126 Pa. St. 478, the opinion seems to warrant the contention of the appellants in this regard. But a careful consideration of that decision shows that it is not applicable here. The case arose under the provisions of the act of August 1, 1868, Public Laws, 1168, which was an act giving a right of lien, in the city of Philadelphia only, in all cases of repairs, alterations, and additions, but annexed certain conditions and qualifications as attending the exercise of the right, one of which was a prohibition of lien in the case of a conveyance of the property before the filing of the lien. We held that the act of 1868 was the law in Philadelphia in all <sup>428</sup> cases of repairs, alterations, and additions, and, as this was a clear case of addition under the act, the right of lien was only enforceable in conformity with the act. The reasoning upon which the decision was based was that, "if there are two acts, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also, and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision it must be taken that the latter was designed as an exception to the general provision." The act of 1868 was special and local, and conferred a lien within the limits of the city of Philadelphia, which had no existence in any other part of the commonwealth. Within that city it was the law in all cases of repairs, alterations, and additions, but outside of the city it was not the law in any such case. Hence the doctrine invoked as a principle of construction was directly applicable. But in the present case there is no such situation. The law of 1887 is just as general as the law of 1836, or the law of 1856. It and they extend to all parts of the commonwealth. As between them there is no conflict. The act of 1836 extended to all cases of buildings, but was held not to include cases which were merely cases of repairs, alterations, or additions. The law of 1856 embraced all cases of certain designated kinds of machinery. The law of 1887 simply enlarged the subjects of lien generally by extending them to repairs, alterations, and additions,



without taking away from the laws of 1836 and 1856 the right of lien in the cases which they embraced. Either of the former laws would embrace the present structure, and therefore there was a complete remedy under those acts. The right of lien in this case does not depend in any degree upon the act of 1887; it is complete without it, and is, therefore, not subject to its conditions or qualifications. We are of opinion that the learned court below was correct in the conclusions reached.

Judgment affirmed. —

**MECHANIC'S LIEN—BUILDINGS AND STRUCTURES AGAINST WHICH A LIEN MAY BE ENFORCED.**—The word "building" includes those structures which have capacity to contain, and are designed for the habitation of, men or animals, or the sheltering of property: *La Crosse etc. R. R. Co. v. Vanderpool*, 11 Wis. 119; 78 Am. Dec. 691, and extended note.

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## KINSLOE v. DAVIS.

[167 PENNSYLVANIA STATE, 519.]

**GARNISHMENT.—FUNDS IN THE HANDS OF A RELIEF ASSOCIATION** belonging to a beneficiary named in the certificate of a deceased member thereof are not subject to garnishment, if the rules of such association provide that the beneficiary is entitled to payment of such funds in person only upon the execution of a release, and such release has not in fact been executed.

*J. Scott, Jr.*, for the appellant.

*P. Boyd*, for the appellees.

**521 WILLIAMS, J.** The judgment in this case was entered "on answers" made by the garnishee. The complaint now made is that the answers were misunderstood, or their legal effect mistaken, by the court below. The plaintiff alleged that the railway company was indebted to Thomas B. Davis, the defendant, and sought to reach the alleged debt by an attachment execution in which the railroad company was made garnishee. Interrogatories were served, and the answers on which the judgment was entered were made in response to them. These answers deny any indebtedness to the defendant, and any business transactions with him, but proceed **522** to state that his father was for many years in the employ of the railway company, and became in March, 1886, a member of the Pennsylvania Railroad Relief Fund. This

fund, made up from fees and dues of members, and donations made by the railroad company, is administered by the company in accordance with certain fixed rules and regulations. One of these appears to be that the members may name the beneficiary to whom at his death the sum named in the certificate shall be paid. Another requires the company to pay only to the person or persons named as beneficiaries, and upon the execution of a release to the company from all claims that might or could be made by such beneficiary for or on account of the death of said member. The answers further set forth that William Davis, the father of the defendant, named his five children as his beneficiaries, so that the defendant would be entitled to receive from the company upon the execution of the release required, one-fifth of two hundred and fifty dollars, less one-fifth of the funeral expenses; but that under the "regulations and practice of the said relief department," this sum would be payable to the defendant only, and not to him until the execution and delivery of the release.

Such associations, organized for the relief of members in case of injury and of their families in case of death, are not against public policy: *Johnson v. Philadelphia etc. R. R. Co.*, 163 Pa. St. 127. And the regulations adopted in order to secure the contemplated relief to the persons entitled to it should be upheld unless they are contrary to law. The regulations set up in the answers were not contrary to law, and, although no copy of them has been appended, the correctness of the answers in this respect has not been excepted to or denied. Accepting them as true as the motion for judgment "on answers" does, the question raised is, do these answers show a fund in the hands of the garnishee liable to seizure under the attachment? We think they do not. They show the existence of a fund belonging to the Pennsylvania Railroad Relief Association in the hands of the garnishee. They show that this fund is administered for the relief association by the garnishee, and under the regulations which the relief association has adopted. They show that under these regulations the sum due to a beneficiary is payable only to him or her in person, and upon the execution of a release to the railroad company, for all liability <sup>522</sup> growing out of the accident or death by reason of which the money is payable. An attaching creditor is not within the mischief against which the relief association was intended to afford protection. He

does not fall within the description of the person or persons entitled to take. He can neither execute, nor compel his debtor to execute, the release to the railroad company. The answers do not support the judgment, and for this reason it is reversed.

The record is remitted and a procedendo awarded.

**GARNISHMENT OF LIFE INSURANCE MONEY.**—A policy of life insurance payable to the legal representatives of the insured is not subject to attachment during his life; *Day v. New England etc. Ins. Co.*, 111 Pa. St. 507; 58 Am Rep. 297.

## BAILEY v. PHILADELPHIA.

[167 PENNSYLVANIA STATE, 569.]

**MUNICIPAL CORPORATIONS.—MORAL OBLIGATION IS GOOD CONSIDERATION** for the payment by a municipal corporation of public money for services rendered.

**MUNICIPAL CORPORATIONS.—TRANSFERS OF APPROPRIATIONS.**—A city council has power by ordinance to transfer public money from one appropriation to another for the purpose of paying a moral obligation incurred by the city.

**RIGHT TO COMPROMISE** and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity.

**MUNICIPAL CORPORATIONS.—APPROPRIATIONS.**—A statute providing that "no money shall be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the appropriate department" does not interfere with the discretion of the city council over the department to which appropriations shall be properly assigned for payment.

**MUNICIPAL CORPORATIONS.—"APPROPRIATE DEPARTMENT"**—**STATUTORY CONSTRUCTION.**—Under a statute providing that no money shall be drawn from the city treasury except . . . upon warrants signed by the head of the appropriate department," the words "appropriate department" include all officials charged with duties pertaining to the city government for whose expenses the city is obliged to provide. The clerk of the city council is such official, although not technically the head of the department.

**BILL IN EQUITY** for an injunction to restrain the payment of money to one Margaret T. Sherry. The trial court, after having entered a preliminary injunction, subsequently dissolved it, and plaintiffs appeal.

*T. M. Etting, D. W. Sellers, and J. P. Keating*, for the appellants.

*J. G. Johnson, W. A. Hayes, G. L. Crawford, C. F. Warwick*, city solicitor, and *J. Alcorn*, assistant city solicitor, for the appellee.

<sup>571</sup> MITCHELL, J. This case does not raise any question of the relative powers of the board of education, and the sectional school boards, nor involve in any way the merits of the original controversy which came to this court in *Commonwealth v. Jenks*, 154 Pa. St. 368.

What we have now before us is the power of the councils of Philadelphia to make the appropriation to Miss Sherry, and to do it by a transfer of an item from one appropriation to another. On this subject the main question is the right of councils to recognize a moral obligation as a good consideration for the payment of public money.

The facts are not in dispute. Miss Sherry was elected by the sectional school board as supervising principal of the John Moffet Combined Grammar and Secondary School, in October, 1891, and began the performance of her duties as such on January 4, 1892. The board of education on February 10th refused to confirm her election, and on March 8, 1892, regraded the school so as to dispense with the office of supervising principal. Miss Sherry and the sectional board which had elected her, claiming that her title was complete by the election and did not require to be confirmed by the board of education, she brought suit by mandamus to compel the board of education to certify her name on the roll of teachers to the city controller. This suit was decided against her by this court on April 24, 1893. The councils of the city inserted in the appropriation to the board of <sup>572</sup> education for 1894 an item, No. 56, to pay Miss Sherry "the amount of salary in dispute," but the board refusing to draw a warrant for this item it was transferred by ordinance June 18, 1894, to a new item, 84, in appropriation of the clerks of councils, "to pay Miss Margaret Sherry said salary."

This appropriation is, on the face of it, to pay for services rendered. Whether it is accurately called salary or not is unimportant. Nor is it material that the services may not have included all the work of a supervising principal for the full period. That was not Miss Sherry's fault. She held herself in readiness to perform, and, if councils had a right to compensate her at all, the amount was within their discretion so long as it was exercised in good faith and without abuse. Miss Sherry not only held herself ready to render the services but claimed the right to do so. That right depended on a question of authority under the law between the sectional school and the board of education, and the real contest

in the matter was between those two bodies and was fought over Miss Sherry's head. For that she was not responsible. The contest terminated adversely to Miss Sherry's right by the decision of this court in April, 1893, and no compensation was claimed by her or granted by councils for any period after that date.

While the contest was pending the legal question may fairly be said to have been in doubt. The title of certain teachers to office would seem to be complete by an election by the sectional board, under the law as stated in the opinion of the city solicitor of Philadelphia, March 2, 1888 (App. to Ord., 1888, p. 17), while the qualifications, etc., and the title of others depended on the action of the board of education. How far supervising principals belonged to one class or to the other was open to question. Had the city councils, while Miss Sherry's claim was pending and undecided, passed an ordinance to pay her in settlement of her claim there could have been no doubt of their authority to do so. The right to compromise and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity. If it did, compromise instead of being an end of litigation which the law favors, would be only an additional complication in the progress of it. How far does the law prescribe as mandatory any different rule, <sup>572</sup> when the settlement is not made until after the question of right is decided? Undoubtedly the legal claim of Miss Sherry was at an end when this ordinance was passed. She had no right which could have been enforced by action. But it does not follow that her claim was without merit. The committee of councils reported, on the contrary, after investigation, that it was founded on services rendered under claim and color of right and title, and was meritorious. Does the law prohibit the city from recognizing the moral obligation arising from these circumstances? We do not find any thing that compels us to so hold. A moral obligation in law is defined as one "which cannot be enforced by action but which is binding on the party who incurs it, in conscience and according to natural justice," and again, a "duty which would be enforceable by law, were it not for some positive rule, which, with a view to general benefit, exempts the party in that particular instance from legal liability": 15 Am. & Eng. Ency. of Law, 716. In this state it is held that such an obligation will sustain an express promise to pay, and, *a fortiori*, an

actual payment: *Hemphill v. McClimans*, 24 Pa. St. 367; *Stebbins v. Crawford County*, 92 Pa. St. 289; 37 Am. Rep. 687; *Leonard v. Duffin*, 94 Pa. St. 218; *Brooks v. Merchants' Nat. Bank*, 125 Pa. St. 394; *Holden v. Banes*, 140 Pa. St. 63; *Kelly v. Eby*, 141 Pa. St. 176. If a mere promise to pay under such circumstances would be enforced by law against an individual, certainly an actual payment, or its equivalent, an order by the councils on their ministerial officer who has no duty in reference thereto but obedience, should be sustained against a municipal corporation. Councils it is true are trustees and the law limits their expenditure of public money to public purposes, but they are also representatives of their constituents, and delegates of the city's legislative powers, and there is nothing in the law or in sound public policy to prohibit the city from being honest, and paying its *bona fide* debts which are good in conscience and justice, though, for sufficient other reasons, there is a general rule which prevents them from being enforceable by law.

The opinion of the learned judge below calls attention to some recent instances of similar municipal action; among them, that in regard to Mr. Oellers, who acted as city treasurer for a time under an election by councils to a vacancy which it was subsequently decided should be filled by the appointee of the <sup>574</sup> governor: *Commonwealth v. Oellers*, 140 Pa. St. 457. Councils passed an ordinance making compensation to him for his services. It would have been a very doubtful public policy which would have compelled councils to proclaim in advance that the officer to be elected would get no compensation for his eight months or more of labor and responsibility unless he could maintain his title *de jure* to the office, the mode of filling which was then known to be in dispute. With such an announcement it is not likely that the office would be accepted by any man of the character and abilities suited to that responsible position, but rather that it would go to some one who wanted it, in the language of the day, for "what there was in it."

The other objections are to the method of payment adopted. The item was originally contained in the appropriation to the board of education, and, when that department refused to draw the warrant, it was transferred to the appropriation to the clerks of councils. Transfer of items is expressly recognized by the act of June 1, 1885, article 7, Public Laws, 45, which provides that the city controller "shall not suffer

the appropriation for one item of expense to be drawn upon for any other purpose, or by any department other than that for which the appropriation was specifically made, except on transfers made by ordinance of councils."

Article 6 of the same act provides that "no money shall be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the appropriate department," and it is argued that this item belongs properly to the department of education. But "appropriate department" in this section means the department to which the appropriation is made, and whose head is to draw the warrants. It is the general direction which is embodied again specifically as to the controller in section 7 already quoted prohibiting that officer from countersigning any warrant drawn by "any department other than that for which the appropriation was specifically made." It is not intended to interfere with the discretion of councils over the department to which appropriations should properly be assigned. How far councils might under this discretion appropriate to one department funds the control of which was within the objects and jurisdiction of another, we <sup>575</sup> need not consider, as no such case is before us. This appropriation is not an interference with the functions of the department of education, for it does not assume to determine any question of title in Miss Sherry as a teacher, or her legal right to salary as such. It is a recognition and payment of an obligation of the city for services rendered, and the department in which they were rendered is not in any way material on this question. If the obligation had been binding in law and a judgment had been obtained upon it, there would have been no compulsion on the councils to assign the appropriation to pay such judgment to the department of education because the original cause of action arose there. It might appropriately be assigned to the law department which has the control and supervision of the city's lawsuits. So in the present case the appropriation is one of the miscellaneous class which councils may commit to the care of any department they see fit. Nor is the objection that the clerks of councils are not a department of the city government any more forcible. There are many expenses of the city which are not directed by a technical department, and appropriations are annually and regularly made among others to the district attorney, the clerk of the quarter sessions, the coroner, the sheriff, and other officers who form no part of the city

government strictly so called, and are certainly not departments thereof under the act of 1885. The words "appropriate department" in that act, therefore, must be held to include all officials charged with duties pertaining to the city government, for whose expenses the city is obliged to provide. The clerks of councils are such officials as to all miscellaneous matters which councils may devolve upon them, though they are not technically heads of departments.

This case was heard in the court below on a motion to dissolve a preliminary injunction, but, as the whole controversy is involved, the parties have agreed that it shall be treated here as upon final hearing.

The order dissolving the injunction is affirmed and the bill dismissed with costs.

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**CONTRACTS—CONSIDERATION—MORAL OBLIGATION.**—A moral obligation is sufficient to support an obligation to pay: *Robinson v. Hurst*, 78 Md. 59; 44 Am. St. Rep. 266; *Ferguson v. Harris*, 39 S. C. 323; 39 Am. St. Rep. 731, and extended note.

**COMPROMISES OF DOUBTFUL CLAIM—CONCLUSIVENESS OF.**—A compromise of a doubtful right procured without such deceit as would vitiate any other contract concludes the parties, though ignorant of the extent of their rights: *Hoge v. Hoge*, 1 Watts, 163; 26 Am. Dec. 52, and note. A fair settlement of conflicting claims between parties is binding upon them though they may have yielded legal rights: *Converse v. Blunrich*, 14 Mich. 109; 90 Am. Dec. 230, and note; *Knotts v. Preble*, 50 Ill. 226; 99 Am. Dec. 514, and note. But where a disputed claim is legally groundless, a promise made upon a compromise of it is not binding: *Schnell v. Nell*, 17 Ind. 29; 79 Am. Dec. 453.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**SOUTH CAROLINA.**

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**BAUM v. TRANTHAM.**

[42 SOUTH CAROLINA, 104.]

**PAYMENTS—APPLICATION OF.**—A debtor may apply moneys paid by him to either of several obligations; but, failing to direct such application at the time of payment, his creditor may at any time prior to judgment apply it to such claim as he sees fit.

**PAYMENTS—DIRECTING APPLICATION OF.**—The proper and only time for the mortgagor to direct the application of the payment of a surplus of proceeds arising from the sale of the mortgaged property to the mortgagee is at the time that such property is delivered to him by the mortgagor. Failing to make such direction then, he cannot make it subsequently, though he did not know at the time of surrendering the property that after applying it to the debt on which it was surrendered a surplus would remain in the hands of the creditor.

**PAYMENTS—APPLICATION OF—MORTGAGE OVERPLUS.**—A provision in a mortgage that the net proceeds of any sale made thereunder shall be applied to the payment of the mortgage debt, and any overplus returned to the mortgagor, is not a direction by him to apply such overplus to the payment of any particular debt, and the mortgagee may apply it to any other claim held by him against the mortgagor.

*J. D. Kennedy*, for the appellants.

*W. D. Trantham*, for the appellee.

<sup>106</sup> **McIVER, C. J.** The facts of this case seem to be conceded, and the only controversy is as to the legal rights of the parties under the facts. On the 18th of July, 1888, the defendant executed a mortgage on two town lots to one H. Baum, to secure the payment of two notes, aggregating the sum of \$175, which notes, together with the mortgage, were duly assigned to the plaintiffs herein. <sup>107</sup> On the 15th of March, 1889, the defendant gave to Baum Bros. & Stein a

mortgage on five mules and certain other personal property, to secure the payment of advances to the amount of \$500, payable 1st of October, 1889; and on the 16th of March, 1889, the defendant, by an indorsement thereon, agreed that the lien of said mortgage should be so extended as to cover a balance due on account for 1888, amounting to \$363.77, which should likewise be due and payable on the 1st of October, 1889. This mortgage was also assigned to the plaintiffs herein. On the 4th of January, 1893, defendant delivered to plaintiffs four of the mules covered by the mortgage of personalty, and gave plaintiffs a paper of which the following is a copy: "I hereby waive the advertisement of mules under mortgage to Baum Bros., and consent to their being sold by them at private sale, the proceeds of said sale to inure to my benefit." On the next day, to wit: 5th of January, 1893, by agreement of the parties, the mules were appraised at the sum of \$315, and the plaintiffs agreed to take them at that price; and on the same day plaintiffs made the following entry on their journal: "Camden, So. Ca., January, 1893. Merchandise, 5th, \$315. W. D. Trantham, contingent fund, \$315, for four mules, which has been credited on 1889 mortgage, the same having been appraised by S. B. Latham," and also indorsed on the mortgage of the mules a credit of \$315.

At this time both the plaintiffs and defendant were under the impression that more than \$315 remained due on that mortgage; and between the 5th and the 9th of January, 1893, the plaintiffs made several demands upon the defendant for the balance, \$41.62, claimed to be still due on the mortgage. On the night of the 8th of January, 1893, the defendant discovered from certain memoranda in his possession, which had previously been mislaid, that the proceeds of the sale of the mules had been more than sufficient to pay the real balance due on the mortgage, and on the next morning, the 9th, addressed to plaintiffs a note, informing them of the fact, and directing them to credit the surplus proceeds of the sale of the mules upon the mortgage of the town lots. To this note the plaintiffs replied as follows: "Will you please send us a statement <sup>108</sup> showing how you arrived at the figures named in your letter, so we may so enter upon our books, if we find the same correct." The statement was sent, and the plaintiffs declined to credit the surplus proceeds of the sale of the mules upon the mortgage of the town lots. On the 11th of January plaintiffs wrote defendant, saying: "We beg to say

that we do not agree with you in your statement as to how the matter stands"; to which defendant replied on the next day, saying that he adhered to his position assumed in his note of the 9th, and demanding that the surplus proceeds of the sale of the mules be credited on the mortgage of the town lots. It also appears that, at the time of this transaction, defendant, in addition to the debts due on the two mortgages, was indebted to plaintiffs on other unsecured claims, the amount of which is not stated—which, however, is not material to the solution of the legal question presented.

The only question presented in this action, brought to foreclose the mortgage of the town lots, is whether the defendant is entitled to require the plaintiffs to credit the surplus proceeds of the sale of the mules upon the debt secured by the mortgage of the town lots, or whether the plaintiffs have the right to apply such surplus to the unsecured claims held by them against the defendant. There is, and can be, no dispute as to the rule that, where a debtor owes several claims to his creditor, he has the right, when he makes a payment, to direct the application of such payment to such claim as he may choose; but if he fails to give such direction at that time, then the creditor may, at any time before judgment, apply such payment to such claim as he may see fit. The reason of the rule is that, up to the time of payment of the money, or the delivery of the property agreed to be taken as a substitute for money, such money or property, as the case may be, belongs to the debtor, and he may, therefore, direct its application; but so soon as the money or property passes from the debtor to the creditor, without direction as to its application, it becomes the money or the property of the creditor, and he may, therefore, apply it to whichever debt he chooses. So that this case must turn upon the inquiry, when was the <sup>100</sup> payment of \$315 made by the defendant to the plaintiffs; and whether the defendant did, at the time, give any directions as to its application.

It seems to us clear that this payment must be regarded as having been made on the fifth day of January, 1893, so soon as it was agreed between the parties that the plaintiffs should take the mules at the appraised price; for that was, practically, the same thing as if the defendant had on that day sold the mules, by consent of plaintiffs, to some third person for that sum of money, and turned over the same to the plaintiffs; and, in that event, there could be no doubt that

the payment must be regarded as made on that day; and as there is no pretense that the defendant, on that day, gave any direction as to the application, he lost his right to do so afterward. The fact that both parties were under the erroneous impression that it would require the whole of the sum then paid to extinguish the debt secured by the mortgage of the mules, to which both parties then understood that the money was to be applied, cannot affect the question; for the further fact would still remain, that no direction was then given as to the application of the surplus, if any there should be. If, as indicated in *Bell v. Bell*, 20 S. C. 34, and in *Frost v. Weathersbee*, 23 S. C. 368, 369, the proper time to direct the application of the surplus of the proceeds of sale of personal property, delivered or consigned to the mortgagee or other lienee for sale, is when such property is delivered or consigned to the mortgagee or other lienee, as would seem to be reasonable, inasmuch as the property then passes from under the control of the mortgagor or other lienor, then it is clear that the defendant did not then give any specific directions as to the application of the surplus proceeds of the sale of the mules; for in the paper given to plaintiffs, when the mules were delivered to them, a copy of which is set out above, no such directions were given, for in that paper the defendant simply waived the necessity for an advertisement, and consented that the mules should be sold at private sale, "the proceeds of said sale to inure to my benefit," and when the mules were sold, and the proceeds of sale were applied, first, to extinguish the balance due on the mortgage <sup>110</sup> debt, as the law required, and the surplus of such proceeds was applied to the unsecured claims held by plaintiffs against the defendant, such proceeds did inure to the benefit of defendant.

Nor can the fact that the mortgage on the mules contained the provision, usually found in such papers, that, upon default in payment of the mortgage debt, the mortgagees might seize and sell the mortgaged property, "and apply the net proceeds of such sale to the payment of said debt, returning the overplus, if any, to the said W. D. Trantham," affect the question. Such a provision can, in no proper sense, be regarded as a direction by the mortgagor to apply any surplus of the proceeds of the sale to any particular debt. It is nothing more than an express declaration of what the law would necessarily imply without such declaration. to wit,

that the mortgagee, upon breach of the condition of the mortgage, becomes the legal owner of the mortgaged property, and as such may seize and sell the same in satisfaction of the mortgage debt, subject, however, to an equity upon the part of the mortgagor to require an accounting from the mortgagee for the proceeds of the sale, but in such accounting the mortgagee is entitled to credit for any unsecured claims which he may hold against the mortgagor: *Reese v. Lyon*, 20 S. C. 17; *McClendon v. Wells*, 20 S. C. 514.

Again, it is urged that plaintiffs, by their first letter, consented to credit the surplus upon the mortgage of the town lots, if the statement furnished by the defendant should be found correct. But that letter cannot be so construed. It certainly does not say so, and its terms imply exactly the contrary; for the credit was to be entered "upon our books," where, doubtless, the unsecured account appeared, and not upon the mortgage of the town lots. Besides, the plaintiffs, in their letter of the 11th of January, expressly declined to accept the correctness of defendant's statement.

It seems to us, therefore, that, in any view of the case, the defendant having failed to exercise his right to direct the application of any surplus of the proceeds of the sale of mortgaged property which might remain after satisfying the mortgage debt, either at the time of the delivery of <sup>the</sup> the property to the mortgagees or at the time of the sale thereof, he lost his right to give such direction, and his attempt to do so four or five days afterward cannot avail him, and we think the circuit judge erred in holding otherwise.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

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DEBTOR AND CREDITOR—APPLICATION OF PAYMENTS—GENERAL RULE. When a creditor holds several claims against his debtor the latter, on making a payment, may direct upon which debt it shall be credited, but, failing to do this, the creditor may make the application in the manner most to his interest: *Beck v. Haas*, 111 Mo. 264; 33 Am. St. Rep. 516, and note; *Perot v. Cooper*, 17 Col. 80; 31 Am. St. Rep. 253, and note.

## HEYWARD v. FARMERS' MINING COMPANY.

[42 SOUTH CAROLINA, 133.]

**REAL PROPERTY—TRIAL OF TITLE.**—If a complaint to recover damages for trespass to land and to enjoin further trespass alleges that plaintiff is in possession and seised in fee, a denial of these allegations raises an issue as to title triable on the law side of the court.

**REAL PROPERTY—TRIAL OF TITLE—PENDENCY OF ANOTHER ACTION.**—If a complaint embraces two causes of action, one for the recovery of real property and the other for equitable relief, the former should be set on the law side of the court, and the title there determined, without requiring plaintiff to bring another action, but, if he is so required, and does institute another action, error cannot be predicated upon the failure of the trial court to sustain defendant's plea of another action pending if such plea is not brought up for consideration by the court, and no exception is taken to the failure to consider and pass upon it.

**APPEAL.**—FINDINGS OF FACT in a law case cannot be reviewed on appeal.

**DEEDS.**—THE ACCIDENTAL OMISSION OF A SEAL from a deed does not affect its validity.

**REAL PROPERTY—TITLE—EVIDENCE.**—The occupant of land may rely on deeds and possession as showing color of title and the extent of his claim.

**REAL PROPERTY—TRIAL OF TITLE.**—MERE POSSESSION OF TIDE LANDS without proof of title is not sufficient to enable the occupant to recover, as against the state and its licensee, in an action of trespass to try title in which plaintiff alleges that he is seised in fee and the defendants deny it.

**CONFLICT OF LAWS.**—THE STATUTE OF LIMITATIONS IN FORCE WHEN A CAUSE OF ACTION ACCRUES controls rather than an amendment subsequently adopted. The amendment does not operate retroactively.

**WATERCOURSES.**—TO BE NAVIGABLE a stream must have sufficient depth and width to float useful commerce, the test being navigable capacity, without regard to present use or whether the surroundings are such as to make it presently useful for commerce.

**WATERCOURSES—NAVIGABILITY.**—THE FACT THAT A STREAM HAS NOT BEEN IN ACTUAL USE for the purposes of commerce does not affect its navigable character.

**WATERCOURSES.**—NAVIGABLE STREAM WHICH RUNS UP INTO A PRIVATE ESTATE and is there lost in a surrounding marsh, though it has never been used as a highway for commerce, and is not connected with other such highways, if capable of such use, is not thereby deprived of its navigable character.

**GRANTS, REVOCABILITY OF.**—GRANTS OF LAND COVERED BY NAVIGABLE STREAMS, though made by state officers under power to grant vacant lands, may be subsequently revoked by the state.

ACTION by W. M. Heyward against the Farmers' Mining Company on the following complaint:

"I. That at the times hereinafter stated the plaintiff, William Manigault Heyward, trustee, was and still is the owner in fee simple and in possession of all that tract of

land situate, lying, and being in the county of Beaufort, state aforesaid, containing twenty-four hundred acres, more or less, butting and bounding to the north on lands of William Manigault Heyward, trustee; to the south on St. Helena sound; to the east on Combahee river, and to the west on Bull river, having such marks, forms, and bounds as are represented by a certain plat annexed to a grant from the state of South Carolina to Christopher Williman, duly recorded in the office of secretary of state of South Carolina.

"II. That at the times hereinafter stated the defendant, the Farmers' Mining Company, was and still is a body corporate under the laws of this state, having a capital stock of ten thousand dollars.

"III. That on or about the 4th day of November, 1891, the said defendant, the Farmers' Mining Company, either by themselves or by their servants and agents, acting with their consent and by their direction and authority, entered unlawfully upon the premises described in the first paragraph of this complaint, the property of the plaintiff, and committed acts of trespass thereupon, to wit: By proceeding to dig and mine and remove from the said lands deposits of phosphate rock of great value, and although they (the said defendant) have been so mining only for the period of ten days, yet they have already dug therefrom about 400 tons, of the value of \$2,800, and are continuing, notwithstanding the protest and warning of the plaintiff, to mine and remove from said lands said valuable phosphate deposits at the rate of about fifty tons per day. That the injury so caused to this plaintiff is of an irremediable and continuing character; that their acts will be destructive to the very substance of the estate, and will tend to its ultimate destruction, the chief value of the property being on account of the deposits of phosphate rock thereon and therein contained, and that the capital of the defendant company being only ten thousand dollars, and its responsibility limited, it will be impossible for it to respond in damages in an action at law; and, even in case of the recovery of judgment against the defendant corporation, the amount of damage which will accrue to the plaintiff before such action or actions can be brought and finally determined will be so large that on a judgment and execution a recovery cannot be had and the money made, and that, except by the intervention of this honorable court, irreparable loss and damage will accrue to the plaintiff.

"IV. That the plaintiff believes that it is the settled and fixed purpose of the defendant and their officers, agents, and servants to continue their course of conduct as above outlined, and to repeat and continue the said trespasses upon the said property of the plaintiff, to the great detriment and damage of the plaintiff, and that the said defendant will, unless restrained by the order of this honorable court, continue such unlawful acts and trespasses, and so continue to annoy and molest the plaintiff, and destroy the value of the property of the plaintiff, and that this course will also cause a multiplicity of suits against the said defendant.

"V. That the plaintiff further alleges that he is powerless to stop this constant trespass and wrongs of the defendant by any suit or suits at law, on account of their being repeated so constantly and continuously. That incalculable and irremediable loss and damage will come to the plaintiff unless the defendant, its agents, servants, and attorneys are restrained and enjoined from the commission of these wrongs; and that the capital of the defendant being only ten thousand dollars, and its means pecuniarily being small, the plaintiff has no adequate remedy at law, but that all these matters and things can be remedied only in a court of equity.

"Wherefore, the plaintiff prays judgment that the defendant, its officers, agents, servants, and attorneys be restrained and enjoined from proceeding to dig, mine, and remove, or either, any of the phosphate rock or phosphatic deposits from the lands described in this complaint, and that he may have such other and further relief as the nature of the case may demand and to the court seem meet."

Upon this complaint a continuing injunction was granted by the trial court, but plaintiff was required to institute an action on the law side of the court to determine the title to the land. No appeal was taken from this order, and no exceptions were filed. Plaintiff then filed the following second complaint:

"The plaintiff, William Manigault Heyward, trustee, complaining of the defendant, the Farmers' Mining Company, a body corporate under the laws of said state, alleges:

"I. That he, the plaintiff, William Manigault Heyward, trustee, is now, and was at the times hereinafter mentioned, seised in fee and in possession of the premises hereinafter described, to wit: All that tract of land, situate, lying, and being in the county of Beaufort, state aforesaid, containing



2,400 acres, more or less, butting and bounding on the north on lands of William Manigault Heyward, trustee; to the south on St. Helena sound; to the east on Combabee river, and to the west on Bull river; the said tract of land having been granted to Christopher Williman by the state of South Carolina on the 4th day of September, 1786, said grant being recorded in Grant Book MMMM, page 316, of the office of secretary of state of South Carolina, said land having such marks, forms, shapes, and bounds as are represented by a certain plat annexed to said grant and made a part thereof.

"II. That the defendant, the Farmers' Mining Company, is now, and was at the times hereinafter mentioned, a body corporate under the laws of the state of South Carolina.

"III. That on or about the 4th day of November, 1891, the defendant, the Farmers' Mining Company, either by themselves or by their servants and agents acting with their consent and by their direction and authority, forcibly broke and entered the plaintiff's said lands, and then and there dug and mined and removed from said lands (the property of the plaintiff) deposits of phosphate rock amounting to about 350 tons, of the value of \$2,000, and converted and disposed of the same to their own use, and did commit and do other wrongs and enormities upon the said lands of the plaintiff, to the damage of the plaintiff \$2,000.

"Wherefore, the plaintiff demands judgment against the defendant for the sum of \$2,000 and costs."

The defendants in their answer alleged: 1. That, at the time of the commencement of this action, there was and is another action pending in the same court between the same parties, for the same cause of action; 2. Deny each and every allegation contained in paragraphs one and three of the complaint; 3. Allege that on November 7, 1891, the defendants as the agents and licensees of the state of South Carolina, did enter Shingle creek, a navigable stream, and the property of said state, and did commence to mine and remove phosphate rock and phosphatic deposits from the bed of said stream, below low-water mark and continued in possession as the agent and licensee of said state.

*Elliott & Townsend and Attorney General Buchanan*, for the appellants.

*W. H. Heyward and Mordecai & Gadsden*, for the appellee.

<sup>143</sup> GARY, J. The issues involved in this case will be understood by referring to the two complaints; the second answer of the Farmers' Mining Company, which was also adopted by the state as its answer when, upon petition, it was <sup>144</sup> made a party defendant; the judgment of the court below; appellants' exceptions; plaintiff's notice as to estoppel.

First exception. "That his honor erred in holding that this action is sufficient to test the title as contemplated by the order of Judge Wallace, directing plaintiff to institute an action on the law side of this court for the purpose of determining the question of title to the land described in the complaint; whereas, this action presents no issues not involved in the first action in which said order was made." The complaint alleges that the plaintiff is seised in fee, and, at the time therein alleged, was in possession of the premises described in the complaint. These allegations are denied by the defendants. This raises the question of title to the land, and is a compliance with the order of his honor, Judge Wallace, bearing upon this question, viz: "That within ten days from the signing of this order the plaintiff do institute on the law side of the court such action as may be advised by his counsel for the purpose of determining the question as to the title to the land described in the complaint." Mr. Justice McGowan, in *Anderson v. Lynch*, 37 S. C. 575, says: "The Code of Procedure has made no material changes in the primary rights of parties, or in the different causes of action, nor undertaken to give any new redress; but has only changed the mode by which redress is reached and applied. It has provided what it calls 'an action for the recovery of real property,' in the place of the old action of trespass to try titles, which, as it is understood, embraces three elements, viz: the writ of right to try the title, ejectment to recover the possession, and also, for mesne profits: See *Geiger v. Kaigler*, 15 S. C. 262. As we think, the action cannot be maintained unless there has been an actual trespass by the defendant. It is not absolutely necessary that the trespass should have been committed by the defendant himself in person, but it may be committed through and by another as an agent or tenant."

So much of this exception as complains that "this action presents no issues not involved in the first action in which said order was made," will be considered in connection with the second exception. This exception is overruled.

<sup>145</sup> Second exception. "That his honor erred in not dismissing this action, there being another action at the time of the commencement of this action pending in this court, between the same parties, and involving the same issues." The first complaint embraced two causes of action—one was an action for the recovery of real property, and the other was an equitable action for injunction: *McMahan v. Dawkins*, 22 S. C. 314; *De Walt v. Kinard*, 19 S. C. 292. The action set forth in the first complaint for the recovery of the land should have been placed on calendar 1, and tried by a jury, unless a jury trial was waived; the equitable action should have been placed on calendar 2, and tried by the judge sitting as a chancellor. There was no necessity for the order requiring the plaintiff to institute another action on the law side of the court for the purpose of determining the question as to the title to the land.

It has been urged as an objection to this exception that no appeal was taken from the order of Judge Wallace. The appeal from that order, however, could only be taken in the case in which it was made, and that case is not before this court. When the second action was instituted the defendants had the right to set up as a defense, that there was another action pending between the same parties for the same cause. It appears, however, that "at the hearing, the first defense set up in the answer was not brought up for the consideration of the court"; nor does it appear that the defendants introduced any testimony to sustain this defense. It was not considered by the circuit judge in rendering his judgment, and may have been considered by him as waived; but even if he had desired to consider it, we do not see any testimony upon which it could have been sustained. It is also questionable whether this exception can be considered by this court, as it does not complain of error on the part of the circuit judge in failing to consider a defense set up in the answer, as was done in the case of *Aultman v. Utsey*, 41 S. C. 305. This exception is overruled.

Third exception. "That his honor erred in holding that the plaintiff had sufficiently connected himself with the grant to Christopher Williman, dated September 4, 1786." This involves <sup>146</sup> only a question of fact, which cannot be reviewed by this court, as this is a law case. "So far as questions of fact, however, are concerned, this court could do nothing, even if such conclusions of fact should appear erroneous to us, for

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this court is without authority, as it has been repeatedly held in our decisions, to canvass such findings," etc: *Stepp v. National etc. Assn.*, 37 S. C. 434. See also *Rhodes v. Russell*, 38 S. C. 424.

The circuit judge says: "The place on the creek at which the alleged trespass was committed is covered by the plat accompanying the grant from the state to Christopher Williman of two thousand four hundred acres of marsh land. . . . I think the plaintiff has sufficiently connected himself with this grant. The only exception brought to my attention is that a deed from Christopher Williman, Sr., to Christopher Williman, Jr., wants a seal. It seems to me that, under the ruling of the supreme court in *Trustees v. Bryson*, 34 S. C. 401, this deed is sufficient. The seal seems to have been, as in that case, accidentally omitted," etc: See also *Sullivan v. Latimer*, 38 S. C. 417. This exception is overruled.

Fourth exception. "That his honor erred in holding that land below high-water mark was conveyed by said grant to Christopher Williman." The circuit judge found as a fact that the stream in which the land lies is not navigable, and the rule prevailing as to navigable streams cannot be applied. Furthermore, this exception only involves a question of fact, which the court in this case cannot review.

Fifth exception. "That his honor erred in holding that any of the papers or deeds introduced in evidence afforded 'color of title' to the marsh land below high-water mark." The circuit judge shows that the plaintiff relied upon deeds and possession of the land as color of title. The court, in *Duren v. Strait*, 16 S. C. 469, says: "In *Simmons v. Parsons*, 2 Hill (S. C.), 492, color of title is defined to be 'any thing which shows the extent of the occupant's claim.'" This exception is overruled.

Sixth exception. "That his honor having found as matter of fact that, at the places where the alleged trespasses were committed, <sup>147</sup> the tide ebbs and flows in and out from Coosaw river, and that the water there was seven feet deep at low water, and wide enough to float a dredge and barge carrying seventy-five tons of rock, he erred in not holding as matter of law that said place was the property of the state, no grant from the state conveying lands below high-water mark on Coosaw river having been produced." The circuit judge could not have decided as contended in this exception, unless he had found as matter of fact, that, where the alleged trespasses

were committed, the stream was navigable. This exception questions a finding of fact by the circuit judge which cannot be reviewed by this court. This exception is overruled.

Seventh exception. "That his honor erred in holding that plaintiff's mere possession of land covered by tide water was sufficient in an action against the state and its licensee to make it incumbent upon the defendants to prove title in order to justify their alleged trespasses on this possession." So much of the judgment of the court below as bears upon this exception is as follows: "When the alleged trespass was committed, the plaintiff was in possession, and I am not sure that it was necessary for the plaintiff to prove title at all. I am inclined to the opinion that, when the plaintiff proved possession, it was incumbent on the defendant to prove title in order to justify the trespasses on the possession. I think, therefore, that plaintiff has a right to recover, unless that right is defeated by the better title of the defendant as lessees of the state, under the claim that these phosphate deposits are the property of the state, in the bed of a navigable stream or a navigable water."

The views expressed by the circuit judge are in conflict with the principle laid down in *Geiger v. Kaigler*, 15 S. C. 262, in which Mr. Justice McGowan says: "The action was brought, as stated, expressly to recover the land in dispute, upon the ground that the plaintiff had title to the same; and even if the old rule as to the necessity of proving title should now be held to be modified so as to allow a person, deprived of the possession of land, under proper allegations, to recover that possession without proof of title, it can have no application to this <sup>148</sup> case. Here prior possession cannot stand for the title, although it is an action in the form prescribed by the code, and not technically trespass to try title under the statute. The plaintiffs staked themselves upon their title, and they must recover, if at all, upon the strength of this title." The order of Judge Wallace was, that the second action should be instituted for the purpose of determining the title to the land. The plaintiff having alleged that he was seised in fee, it was incumbent on him to prove the allegation. It must also be remembered that the state was one of the defendants, and had the right to stand upon its *prima facie* ownership of the soil. This exception is sustained.

Eighth exception. "That his honor erred in holding that the possession of the plaintiff, and those under whom he

claims, was sufficient to presume a grant to land under high-water mark on a tidal stream, as against the state and its licensee." That part of the judgment of the court below bearing upon this exception is as follows: "Besides, the plaintiff, and those under whom he claims, have for many years been in possession under this deed or paper title, a time of itself sufficient to presume a grant, if none had appeared in the case, to all the land covered by this paper as color of title; and their possession has been such as this marsh land was capable of, and, therefore, sufficient." In the case of *State v. Pacific Guano Co.*, 22 S. C. 50, quoted with approval in *State v. Pinckney*, 22 S. C. 484, the court says: "Until 1870 the doctrine of *nullum tempus* prevailed in this state, and since that time twenty years have not elapsed, so that it is not necessary to consider the scope and effect of the new provision of the code, as to when and under what circumstances the state will not sue."

The possession could not have begun to run against the state before 1870, when the code was adopted: *State v. Arledge*, 1 Bail. 551. The period of time necessary to bar the right of the state, when the possession began to run against it in 1870, was forty years. In 1873 the period was changed to twenty years. The possession having begun to run against the state in 1870, when forty years was the period of time necessary to bar the right of the state, it was necessary for the possession to <sup>149</sup>continue for forty years in order to bar the right of the state, although the code was amended in 1873 changing such time to twenty years. This view is sustained by the case of *Rehkopf v. Kuhland*, 30 S. C. 238, in which Mr. Justice McIver, in delivering the opinion of the court says: "The right of action against Apeler accrued when he took possession in 1871, at which time the statutory period was twenty years, and, as he held possession for only fourteen years, it is quite clear that he had not acquired a title by possession when he conveyed to the intestate, unless it be by virtue of the amendment of 1873, reducing the statutory period to ten years. But the amendatory act contains no words giving it a retroactive effect, and, on the contrary, it is inserted as part of chapter 2 of title 11 of the Code of Procedure, and must, therefore, be read in connection with the first section of that title, which expressly declares that 'the provisions of this title shall not extend to actions already commenced, or to causes where the right of action has already



accrued, but the statutes then in force shall be applicable to such cases.' Now, as in this case the right of action had already accrued when the amendment was adopted, such amendment could not extend in this case, but the statute in force at the time the right of action accrued, which was twenty years, was applicable: *Nichols v. Briggs*, 18 S. C. 473." See, also, *Lyles v. Roach*, 30 S. C. 291.

The period of forty years not having elapsed, the state is not barred of its right, and the circuit judge was in error in applying the statute in this case. In the language of Mr. Justice McGowan, in *State v. Pinckney*, 22 S. C. 484: "It surely cannot be that a requirement as to proof, originating in a statute of limitations and having exclusive reference to that, can be obligatory in a case to which the statute of limitations has no application as an act, somewhat in the nature of a declaratory law." The section of the code under which the plaintiff contends that the state is barred of its right to the land is contained in chapter 2, title 11, referred to by Mr. Justice McIver in the case of *Rehkopf v. Kuhland*, 30 S. C. 238, and the language of Mr. Justice McGowan was used in a case where the attempt was made to interpose <sup>150</sup> this section to defeat the right of the state to the beds of her navigable streams. This exception is sustained.

Ninth exception. "That his honor erred in holding the business done upon a stream is the test of navigability." Tenth exception. "That his honor erred in holding that connection with another stream or highway is necessary to the navigability of a stream." Eleventh exception. "That his honor erred in holding that the surroundings of a stream are a test of navigability." Twelfth exception. "That his honor erred in concluding and holding that a stream flowing up into a private estate cannot be a navigable stream." These exceptions will be considered together. The circuit judge says: "I propose to state my conclusions on this subject and my reasons for them as briefly as possible." After quoting from certain authorities he proceeds to lay down the rule by which to test the navigability of a stream, saying: "It seems to me also, in addition to what I have above said, that to be navigable a stream should not only have sufficient depth and width of water to float useful commerce, but that the surroundings should be such that it may be useful for that purpose." He then proceeds to illustrate what he means by surroundings: "Now Shingle creek flows up with the tide

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into the private estate of the plaintiff, which is a mere marsh,  
and loses itself in that marsh. It has never been used as a  
highway for commerce of any sort, and there seems to be no  
prospect of its ever being so used; it makes no connection  
with any other highways. The only thing which looks like  
commerce is the capacity to float away the phosphate rock  
about which this litigation is carried on—it has been used  
for no other."  
The doctrine of the common law that the navigability of a  
stream is to be determined by the ebb and flow of the tide  
was repudiated in this state in the case of *State v. Pacific  
Guano Co.*, 22 S. C. 50. If his honor had simply said "that  
to be navigable a stream should have sufficient depth and  
width of water to float useful commerce," without attaching  
other conditions, he would have stated correctly the doctrine  
prevailing in this state. Judge Wallace, in his circuit decree,  
which was affirmed on appeal in the case of the *State v. Pacific  
Guano Co.*, 22 S. C. 50, 151 says: "If a channel, therefore,  
in which the tide ebbs and flows, and, in the language of the  
civil law, is floatable, can be used for the purpose of trade and  
commerce, it is a navigable stream. Neither the character  
of the craft nor the relative ease or difficulty of navigation  
are tests of navigability." The circuit judge seems to have  
considered the surroundings of more importance in determin-  
ing the navigability of a stream than its depth, as shown by  
the following from the judgment rendered by him (*italics*  
*ours*), to wit: "It is true that at this point Shingle creek is  
*seven feet at low tide*. The *depth* of water in the two creeks  
referred to by Judge Wallace is not given, and seems to have  
been regarded as not very important, and is not given. It  
must have been sufficient for gathering phosphate rocks in  
the same manner as has been done in this case. In other  
respects Shingle creek is, in my view, just as Big creek and  
Chisolm's creek were. The only boat for any *useful* purpose  
ever employed in these waters was the boat and barge em-  
ployed by the defendant in this case, one of which, it is said,  
carried *seventy-five tons* of phosphate rock."

The test is navigable capacity, and not that the surround-  
ings should be such that it may be useful for the purpose of  
commerce. In discussing the surroundings enumerated by  
the circuit judge to determine the navigability of a stream  
we will take them up separately. The first is: "Now Shingle  
creek flows up with the tide into the private estate of the

plaintiff, which is a mere marsh, and loses itself in that marsh." This condition, relied upon by the circuit judge, was mentioned by Lord Mansfield in the *Mayor of Lynn v. Turner*, 1 Cowp. 86, simply as a circumstance tending to show that the stream did not have navigable capacity, but not as a condition without which, though possessing navigable capacity, it could not be declared a navigable stream, as will be seen by the following language from that case: "How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it so, for there are many places into which the tide flows which are not navigable rivers, and the place in question may be a creek in their own private estate."

The second condition enumerated by the circuit judge is: 152 "It has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used." This makes actual use, and not navigable capacity, the test. The decisions hereinafter mentioned show that such a test would exclude many large rivers in undeveloped sections of the country. A stream may not be useful for commerce at one time, and yet circumstances may make it so. There are certain navigable streams in our state which are very valuable on account of their phosphatic deposits. If the question of their navigability had come before the courts for adjudication before the phosphate rock in them was discovered, and the test laid down by the circuit judge had been applied, it would have resulted in the state being deprived of this valuable source of revenue, because they were not actually used at that time.

The third condition enumerated by the circuit judge is: "It makes no connections with other highways." This test has only been applied in cases where the question was whether a stream was a navigable water of the United States. There are certain conditions to be considered in determining the navigability of waters of the United States, so as to subject them to the laws of interstate commerce, that do not apply to navigable streams under the control of the state. Among these conditions is that mentioned by the circuit judge. In the case of *The Daniel Ball*, 10 Wall. 557, the court, after speaking of the necessity of a rule on the subject of navigable streams in this country, different from that prevailing at common law, says: "A different test must, therefore, be applied to determine the navigability of our rivers,

and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway <sup>153</sup> over which commerce is or may be carried on with other states or foreign countries, in the customary modes in which such commerce is conducted by water."

In discussing the rule laid down in the case just mentioned, the court, in *The Montello*, 11 Wall. 411, says: "It can only be deemed a navigable water of the United States when it forms by itself, or by its connection with other waters, such highway. . . . If, however, the river is not of itself a highway for commerce with other states or foreign countries, or does not form such highway by its own connection with other waters, and is only navigable between different places within the state, then it is not navigable water of the United States, but only a navigable water of the state." *The Montello*, 20 Wall. 430, says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. . . . The learned judge of the court below rested his decision against the navigability of the Fox river below the De Pere Rapids, chiefly on the ground that there were, before the river was improved, obstructions to an unbroken navigation. . . . Apart from this, however, the rule laid down by the district judge as a test of navigability cannot be adopted, for it would exclude many of the great rivers of the country, which were so interrupted by rapids as to require artificial means to enable them to be navigated without break. Indeed, there are but few of our fresh-water rivers which did not originally present serious obstructions to an uninterrupted navigation. In some cases, like the Fox river, they may be so great while they last as to prevent the use of the best instrumentalities for carrying on commerce, but the vital and essential point is, whether the natural navigation

of the river is such that it affords a channel for useful commerce. If this be so, the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sandbars."

In *Moore v. Sanborne*, 2 Mich. 519, 59 Am. Dec. 209, the court says: "In this country the public right cannot depend upon custom or general use; and we accordingly find in nearly all the states this <sup>154</sup> rule has been extended so as to be adapted to the necessities of our trade and commerce, and to embrace all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual use, or the extent of such use. Nor can the fact that a floatable stream has not been used by the public, or has only been used by persons following a particular occupation, deprive such stream of its public character. This principle is one of vast importance to the interest of this and all new states."

*Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641, says: "If a stream could be subject to public servitude by long use only, many large rivers in newly settled states, and some in the interior of this state, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases is whether a stream is inherently, and in its nature, capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs."

*Hickok v. Hine*, 23 Ohio St. 523, 13 Am. Rep. 255, says: "A river is regarded as navigable which is capable of floating to market the products of the country through which it passes or upon which commerce may be conducted; and, from the fact of its being so navigable, it becomes, in law, a public river or highway. The character of a river as such highway is not so much determined by the frequency of its use for that purpose as it is by its capacity of being used by the public for purposes of transportation and commerce."

*Diedrich v. Northwestern etc. Ry. Co.*, 42 Wis. 248, 24 Am. Rep. 399, says: "Waters are here held navigable, when capable of navigation in fact, without other condition. And when we use the terms 'navigable' or 'unnavigable,' we mean capable or incapable of actual navigation."

*Attorney General v. Woods*, 108 Mass. 436, 11 Am. Rep. 380, says: "It is also denied that the stream is navigable, although it is about two feet deep at low water, because it is not proved to be used for the purposes of navigation, except with pleasure boats. The case of *Rowe v. Granite Bridge Co.*, 21 Pick. 344-347, is cited <sup>133</sup> to sustain this position. Chief Justice Shaw there says: 'It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable for some purpose useful to trade or agriculture.' But this language is applied to the capacity of the stream, and is not intended to be a strict enumeration of the uses to which it must be actually applied in order to give it that character. Navigable streams are highways; and a traveler for pleasure is as fully entitled to protection in using a public way, whether by land or water, as a traveler for business. If water is navigable for pleasure boating, it must be regarded as navigable water, though no craft has ever been upon it for the purpose of trade or agriculture. The purpose of the navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation." The case of *Rowe v. Granite Bridge Co.*, 21 Pick. 344, explained in the foregoing case, is one of those upon which the circuit judge based the test of navigability laid down by him; and it does not sustain said test.

The foregoing authorities show that the views expressed by the circuit judge are erroneous, and the test of navigability laid down by him cannot be sustained.

Thirteenth exception. "That his honor erred in concluding and holding that Shingle creek is not a navigable stream from his findings of fact: that 'Shingle creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh. It has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used; it makes no connection with any other highways.'" Fourteenth exception. "That his honor erred in finding that Shingle creek is a stream arising in a private estate, when the great preponderance of the evidence showed it was a navigable tidal salt-water stream, connecting two navigable streams, and is actually navigable." These exceptions only involve questions of fact, and, being a law case, will not be considered by this court, and are overruled.

Fifteenth exception. "That his honor erred in not holding that, even if said stream did not exist there at the time of the <sup>156</sup> original Williman plat and grant from Governor Moultrie, it subsequently existing, becoming navigable, and covering the land now its bed, made it a navigable stream, and, below high-water mark, the property of the state." This exception seems to have been taken under a misapprehension of what his honor, Judge Fraser, decided. He says: "Whatever changes may have occurred in these creeks and marshes in past geological epochs, and the very existence of these phosphate deposits shows that they have been great, in the absence of any evidence of changes in them in modern times, or in the absence of the actual present operation of any forces of nature which would have worked changes, near the date of this grant in 1786, I am bound to assume that Shingle creek exists to-day in the same condition in which it was at the date of the grant, and the failure of the surveyor to note the creek on the plat is not sufficient evidence to the contrary." His honor did not hold that the stream had become navigable; on the contrary, he decided, as matter of fact, that it is not navigable. There is, therefore, no necessity for the application of the principles enunciated in *McCullough v. Wall*, 4 Rich. 83. This exception is overruled.

We now come to a consideration of the question of estoppel relied upon by the plaintiff. This question does not seem to have been made in the court below nor passed upon by the circuit judge. As the case must, however, be remanded for a new trial, and this question may be raised in the court below, we will not decline to consider it. The following is plaintiff's notice as to estoppel: "Please take notice that, if an appeal to the supreme court is perfected in this cause, the plaintiff will insist that the decree herein be sustained, upon the ground that, upon the evidence produced in this case, the state of South Carolina and her licensees are estopped from setting up any claim to the lands described in the complaint, if the supreme court should find itself unable to sustain the said decree on the grounds upon which it is rested by the circuit judge."

If the plaintiff can trace title back to a grant from the state to land covered by tidal though not navigable waters the state <sup>157</sup> would be estopped by its grant. The principle, however, is different when the land granted is covered by navigable waters, as shown by Mr. Justice McGowan in *State*

v. *Pacific Guano Co.*, 22 S. C. 50, to wit: "The absolute rule heretofore referred to, limiting landowners bounded by such streams to the high-water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land-office. There seems to be no doubt, however, that the state as such trustee has the power to dispose of these beds as she may think best for citizens; but not being, as it seems to us, subject to grant in the usual form, under the provisions of the statute regulating vacant lands, it would seem to follow, that, in order to give effect to an alienation which the state might undertake to make, it would be necessary to have a special act of the legislature, expressing in terms and formally such intention." See, also, *Illinois Cent. R. R. Co. v. Illinois*, 146 U. S. 458, in which it is said: "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such power may, for a limited period, be delegated to a municipality or other body, but there always remains with the state the right to revoke those powers, and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands <sup>158</sup> under navigable waters, they cannot be placed entirely beyond the direction and control of the state."

It is the judgment of this court, that the judgment of the court below be reversed, and that the case be remanded to that court for a new trial.

In this case a petition for a rehearing was filed, but it was refused by an order per curiam of September 13, 1894.



**DEEDS—OMISSION OF SEAL.**—The failure of a grantor in a deed of standing timber to affix a seal to the instrument does not render it invalid: *Mee v. Benedict*, 98 Mich. 260; 39 Am. St. Rep. 543, and note. Though an unsealed instrument may not convey the legal title to land it at least conveys the equitable title: *Frost v. Wolf*, 77 Tex. 455; 19 Am. St. Rep. 761, and note.

**COLOR OF TITLE—WHAT IS.**—One who goes upon a tract of land where there is no adverse possession, a portion of which is uninclosed, and claims the whole under a deed describing the entire tract, holds under color of title: *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103, and note. This question is fully discussed in the monographic note to *Tate v. Southard*, 14 Am. Dec. 580.

**LIMITATIONS OF ACTION—EFFECT OF CHANGE.**—The statute of limitations that governs is that in force at the time of the plea thereof: *Sleeth v. Murphy*, Morris 321; 41 Am. Dec. 232. A statute extending the time previously limited for the prosecution of criminal offenses is void as to the offenses upon which the time previously limited has already run: *Moore v. State*, 43 N. J. L. 203; 39 Am. Rep. 558, and note. Where possession was begun under an act which barred rights of entry after a lapse of twenty years and that act was afterward amended so as to bar the right after a lapse of ten years it was held that possessions commencing under the old law were governed by the act which first effected a bar in their favor: *Rawls v. Doe*, 23 Ala. 240; 58 Am. Dec. 289. See, also, *Commonwealth v. Duffy*, 96 Pa. St. 506; 42 Am. Rep. 554, and especially the extended note to *Griffin v. McKenzie*, 50 Am. Dec. 391.

**WATERCOURSES—NAVIGABILITY—TEST OF.**—Navigable waters include not only those in which the tide ebbs and flows, but those which are navigable in fact and afford a channel for commerce or subserve any other beneficial purpose: *Lamprey v. State*, 52 Minn. 181; 38 Am. St. Rep. 541, and note. In North Carolina waters are not deemed navigable unless they are navigable for sea-going vessels: *State v. Eason*, 114 N. C. 787; 41 Am. St. Rep. 811. See, also, the note to *St. Louis etc. Ry. Co. v. Ramsey*, 22 Am. St. Rep. 201, and the extended note to *Miller v. Mendenhall*, 19 Am. St. Rep. 226.

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## STATE v. MOOREHEAD.

[42 SOUTH CAROLINA, 211.]

**PEDDLERS—CONSTRUCTION OF STATUTE.**—The sale of a sample sewing-machine by a traveling salesman whose business is mainly to solicit orders for an established agency for the sale of such machines is not a sale by a hawker or peddler within the meaning of a statute forbidding sales by hawkers and peddlers but providing that its provisions shall not apply to sales by sample by persons traveling for established commercial houses.

*A. Crawford and Barron & Ray*, for the appellant.

*J. P. Thomas, Jr.*, for the appellee.

313 McIVER, C. J. The defendant has been indicted for, and convicted of, a violation of the act of 1893, entitled,

"An act to amend the law as to hawkers and peddlers" (21 Stat., 407); and this appeal presents two questions: 1. Whether the defendant is a hawker and peddler, and as such amenable to the provisions of said act; 2. If so, whether the act is constitutional.

We do not understand that the act of 1893 purports either to define the long-established offense of hawking and peddling, or to enlarge its definition, as heretofore recognized, but simply declares, in its first section, that "no person shall, as hawker or peddler, expose for sale, or sell, any goods, wares, or merchandise," without a license; in its second section the act prescribes who shall issue the required license, and other particulars as to such license; in the third section, certain public officers are required, and any citizen is authorized to demand and inspect the license of any hawker or peddler, and cause to be arrested, any hawker or peddler found without a license, and have him brought to justice; the provisions of the fourth section, upon which the first question in this case mainly turns, are as follows: "That the provisions of this act shall not extend to vendors of newspapers, magazines, vegetables, tobacco, provisions of any kind, or agricultural products, or to sales by sample by persons traveling for established commercial houses; but shall extend and apply to vendors of every other class and kind of goods, wares, and merchandise, and to sales by sample or otherwise, by such hawkers and peddlers of stoves, ranges, clocks, lightning-rods, sewing-machines, pianos, or organs. The other provisions of the act, not being pertinent to our present inquiry, need not be stated.

From this brief review of the provisions of the act it seems to us that there is nothing in the act to indicate any intention on the part of the legislature to give any new definition of the words "hawkers and peddlers," but the sole purpose was to regulate the granting of licenses to persons falling within the well-recognized definition of those words; to declare what classes of goods might, and what might not, be sold by such persons; and to prescribe the penalties for violating <sup>218</sup> the provisions of the act. Thus, by the express provisions of section 4, any person, even though he may be a hawker and peddler, may, with impunity, sell newspapers, magazines, vegetables, tobacco, provisions of any kind, or agricultural products, or may sell, by sample, if traveling for an established commercial house; but a sale by a hawker or

peddler of every other class of goods, wares, and merchandise, or a sale, by sample or otherwise, of stoves, ranges, clocks, lightning-rods, sewing machines, pianos, or organs, is expressly forbidden. It will be observed that, in the permissive clause of this section, any person may sell the classes of articles there specified, viz: newspapers, etc., but, in the prohibitory clause of the section, the language used is not so general, but, on the contrary, the prohibition is confined to a particular class of persons, as is plainly shown by the use of the words, "by such hawkers and peddlers." Hence, in order to render one amenable to the penal provisions of the act, it must be shown, not only that he has sold one prohibited article, but, also, that such sale was made by him as a hawker or peddler. Any other view would subject any citizen, who sells to his neighbor a sewing-machine, a clock, or a piano, to the penalties of this act, and this, surely, was not the intention of the legislature.

Such being our construction of the law, the only remaining inquiry is whether the conceded facts of this case are sufficient to bring the appellant within the provisions of the act.

The facts are stated in the case as follows: "On and prior to the twenty-ninth day of March, 1894, defendant, who is a resident of Richland county, was in the employment of the Singer Manufacturing Company, a corporation organized under the laws of the state of New Jersey, and doing business in the state of South Carolina, as well as in other states. Said corporation has a place of business, storerooms, and warehouses in the city of Columbia, South Carolina, to which place they ship sewing-machines, parts, and attachments, needles, and thread, which are kept on sale at said store in the city of Columbia, for any customer who desires to purchase any of said articles there, and are sold at said store in the usual course of business, and said company pays its taxes on its business and property in the city <sup>and</sup> of Columbia, as do other commercial houses, to the state, the county of Richland, and the city of Columbia. The defendant, on and prior to said twenty-ninth day of March, 1894, was employed by said company, and by it furnished with a wagon in order to travel about from place to place in Richland county and elsewhere, for the purpose of selling sewing-machines, parts, and attachments, and for the purpose of soliciting patronage for the business and store of said company at Columbia, South Carolina. . . . The defendant has, since the 20th of Decem-

ber, 1893, to wit, on the twenty-ninth day of March, 1894, sold a sewing-machine from his wagon, while traveling from place to place, said sale having been made to one John Smith, in Richland county. . . . The said sewing-machine, so sold by defendant from his wagon as aforesaid, was shipped by said company from its store and warehouse at Columbia. As a rule, in the conduct of defendant's business as employee and salesman of said company, he carries about with him but one machine, which he exhibits to people residing in the county through which he travels. Sometimes, as upon the occasion above mentioned, defendant sells the machine from his wagon as he is traveling from place to place, and in that event he is supplied with another by said company from its storerooms and warehouse in the city of Columbia. And sometimes defendant secures orders for other machines, using the machine upon his wagon as a sample; such orders so received are supplied and furnished by the company from its stores and warehouse in said city of Columbia.

Now, while these facts do unquestionably show that a sewing-machine was sold by the defendant at the time and place charged, yet we are of opinion that they entirely fail to show that such sale was made by him as a hawker or peddler. We do not think that the testimony brings the defendant within any recognized definition of the terms "hawker" and "peddler," for which see 9 Am. & Eng. Ency. of Law, 307, 308; *State v. Belcher*, 1 McMull. 40. See, also, *City of Davenport v. Rice*, 75 Iowa, 74; 9 Am. St. Rep. 454, and *Commonwealth v. Farnum*, 114 Mass. 267. This Massachusetts case was very much like the case under consideration. There the court, after stating the facts, used this language: "Upon these facts we <sup>215</sup> think the jury should have been instructed that the defendant was not liable. He was an agent soliciting orders, and a carrier delivering machines ordered. He made no direct sale himself. He did not carry and expose goods for sale, within the meaning of the statute, and his acts did not come within the mischief the statute is intended to prevent. The article he carried was a sample of that which he proposes the purchaser should buy of the company. The fact that he occasionally delivered the sample machine to a purchaser, desirous of obtaining one immediately, cannot so change the character of his business as to bring him within the statute. Nor did the fact that he sold one attachment, and one tuckmarker, capable of being attached, render him

liable; it distinctly appearing that it was not his practice to make such sales. The question is to be determined upon the general character and scope of his business; if this does not bring him within the statute he is not liable for single sales of particular articles, such sales being exceptional and not in the course of his ordinary employment."

It seems to us that the defendant was nothing more than the clerk or salesman of the Singer Manufacturing Company, a foreign corporation, which had an established place of business in the city of Columbia, South Carolina, where it paid its taxes, state, county, and city, on its business and property in the city of Columbia, and its agent or salesman cannot, in any proper sense, be regarded as a hawker or peddler.

Under this view of the case the question as to the constitutionality of the act of 1893 does not necessarily arise, and, therefore, we do not feel called upon to express any opinion as to that question.

The judgment of this court is, that the judgment of the circuit court be reversed.

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MR. JUSTICE GARY dissented on the ground that the sale as set out and explained in the majority opinion was a sale by a hawker or peddler, and that the seller was amenable to the provisions of the statute in question. He also contended that such statute was clearly constitutional.

**PEDDLERS—WHO ARE.**—A peddler is an itinerant vendor of goods, who sells and delivers the identical goods he carries with him. One who sells by sample is not a peddler: *State v. Lee*, 113 N. C. 681; 37 Am. St. Rep. 649, and note with the cases collected. See the extended note to *Grafty v. Rushville*, 57 Am. Rep. 136.

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## MAULDIN v. CITY COUNCIL OF GREENVILLE.

[42 SOUTH CAROLINA, 293.]

**LEGISLATURE, POWERS OF.**—The legislature of a state is clothed with the whole legislative power capable of being exercised therein, subject only to such restrictions and regulation as are embraced in the state and national constitutions.

**CONSTITUTIONAL LAW.**—ALL PRESUMPTIONS ARE SOLVED IN FAVOR of the constitutionality of a statute. It devolves upon one who assails it to point out certainly and clearly wherein it is unconstitutional.

**MUNICIPAL CORPORATIONS CAN EXERCISE ONLY THE POWERS** given them by the legislature, and the latter can vest municipalities only with powers within the restrictions contained in the state and federal constitutions.

**MUNICIPAL CORPORATIONS MAY BE VESTED WITH THE POWER OF TAXATION**, but such power can only be exercised according to charters, and within the limits of the constitution of the state.

**CONSTITUTIONAL LAW.**—"LAW OF THE LAND" means the common law, and the statute law existing in a state at the time of the adoption of a state constitution.

**CONSTITUTIONAL LAW.**—TAXATION OF PROPERTY ABUTTING UPON PUBLIC STREETS to pay the cost of improvements thereon, according to the supposed benefits to such property by such improvement, is opposed to the law of the land and unconstitutional.

**CONSTITUTIONAL LAW.**—TAXATION OF PROPERTY ABUTTING UPON PUBLIC STREETS to pay for the cost of improvements to sidewalks and sewers in front of such land is valid and constitutional.

**CONSTITUTIONAL LAW.**—DECISIONS AND LAWS existing and in effect previous to the adoption of a new state constitution, and not directly or by necessary implication denied therein, survive with full force and effect.

**CONSTITUTIONAL LAW.**—TAXATION FOR EITHER STATE OR MUNICIPAL PURPOSES must be equal and uniform upon all persons and property within the state, or within the municipality.

**CONSTITUTIONAL LAW**—POLICE POWER—STREET IMPROVEMENT.—A state has no power, except its police power, to compel a private citizen to improve his property. The improvement of a public street does not fall within the police power.

*J. A. McCollough*, for the appellant.

*Earle & Mooney*, for the appellee.

295 POPE, J. This action in the court of common pleas for Greenville county had for its object a perpetual injunction against the city council of Greenville, restraining them from any assessment of the property of the plaintiff, and other citizens of said city, who owned land abutting on Main street, beginning at Reedy river, and thence up to the point on said Main street where it is crossed by North street, to pay for two-thirds of the cost of paving the roadway and sidewalk of such street. The basis of the demand for such relief was: 1. That the act of the general assembly which empowered said city council to make an assessment of the property of those citizens for the cost of the paving of such Main street and its sidewalks, so that such citizens should pay two-thirds of the cost of such improvements, said assessment of such two-thirds to be computed against such property-holders *pro rata*, according to the frontage of their property on said streets, respectively, was unconstitutional; and 2. Because such city of Greenville made such assessment without giving the citizens affected thereby any opportunity to contest such assessment so made. The defendants denied that such legislation was unconstitutional, and, then, in case the court should hold it unconstitutional, claimed that the plaintiff

was estopped by his conduct in not opposing its enactment by the legislature, and, ~~see~~ afterward, by his conduct in not opposing the active steps of the defendant to execute such law.

The circuit judge, after a hearing of the cause confined to the complaint and answer, issued the injunction prayed for, and from the decree, therefore, the plaintiff has appealed. The grounds of appeal, etc., will appear in the report.

If the act of the general assembly, authorizing the defendant to make this assessment, is unconstitutional, no other question raised by the appeal may be said to fairly arise upon the record of the case, and, therefore, necessary to be considered and decided. The act in question may be found on page 1372 of Statutes at Large, volume 20, and its text is as follows:

"An act to provide for the grading and paving of the streets, public ways, and alleys of the city of Greenville.

"SECTION 1. Be it enacted by the senate and house of representatives of the state of South Carolina, now met and sitting in general assembly, and by the authority of the same, That the mayor and aldermen of the city of Greenville shall have power and authority, and it is hereby made their duty, to grade, pave, macadamize, and otherwise improve for travel and drainage the streets, public ways, and alleys of said city, or such of them as they may deem advisable, and to construct sidewalks and to pave the same, and put down crossings, curbings, drains, side-drains, and cross-drains, such as may be necessary in their judgment to carry out the provisions of this act.

"SEC. 2. In order to more effectually carry out the authority hereby delegated the said mayor and aldermen shall have power to assess one-third of the costs of such grading, paving, macadamizing, and improving said streets, public ways, and alleys of said city, both as to sidewalks and roadways, upon the abutting property-owners on each side of said streets, public ways, and alleys, so that said property-holders in the aggregate shall pay two-thirds of the said cost, and the said city the remaining one-third; said assessments to be paid by said property-holders *pro rata* according to the frontage of their property on said streets, public ways, and alleys, respectively; and the money arising from such assessments shall be applied to the payment of interest on, and as a sinking fund to redeem, the ~~same~~ same, under such regulations as said mayor and aldermen may by ordinance prescribe.

"SEC. 3. The assessments provided for in section 2 of this act shall be collected as other taxes in said city are collected, and in such installments as the said mayor and aldermen shall by ordinance prescribe.

"SEC. 4. Whenever the said mayor and aldermen shall determine to improve any street, public way, or alley, as hereinbefore provided, they shall cause the same to be carefully surveyed, and the proposed grade definitely established, and ascertain as accurately as possible the cost of the contemplated improvement, and shall also cause the frontage of each piece of property fronting on said street, public way, or alley to be determined and fixed, so that the assessment on each property-holder may be easily ascertained.

"SEC. 5. To obtain the means of carrying out the provisions of this act on the part of the city the said mayor and aldermen may issue and negotiate bonds of said city under the provisions of section 31 of the charter of said city.

"SEC. 6. The said mayor and aldermen shall have power and authority, by ordinance, to provide for all the details necessary and requisite for carrying out the provisions of this act." Approved December 22d, A. D. 1891.

Just now, greater particularity is not needful to bring the issue of the constitutionality of this act before the court than to say that the defendant has passed the ordinances required by this act, and made the assessments therein contemplated upon the plaintiff as one of the property-owners whose property abutted on the front of Main street, in said city, for two-thirds of such cost.

The first question that presents itself here is, what power of legislation has the general assembly of this state? It may savor of extreme care, but it is eminently proper that this court should declare its recognition of responsibility in undertaking to pass upon the rights, duties, and powers of a co-ordinate branch of the state government. We are not unmindful that in the bill of rights, incorporated in as a part of our constitution, section 26 distinctly provides: "In the <sup>298</sup> government of this commonwealth the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other. Yet it is made the duty of this tribunal to decide when either of the other two has exceeded the grant of power under the constitution and laws, when such a question is fairly involved in an action or special proceeding between parties litigant; but any decision



which denies efficacy to an act passed by the legislature for the want of constitutional power is only made after an allowance by us of all presumptions in favor of the rightfulness of such exercise, which are required to be overcome, clearly and certainly, by him who assails such constitutional power.

Our state constitution, as the grant of its power to the general assembly, in section 1 of article 2, is in these words: "The legislative power of this state shall be vested in two distinct branches, the one to be styled the 'senate' and the other the 'house of representatives,' and both together the 'general assembly of the state of South Carolina.'" We may announce, as the result of our considerations, fortified by decisions both before and since the adoption of this our present constitution, that, by the use of the language here quoted, the people, in convention assembled, clothed the general assembly with the whole legislative power capable of being exercised within our borders, subject only to such restrictions upon, and regulation of, such powers as are embraced in the constitution itself or that of the United States: *Copes v. City of Charleston*, 10 Rich. 501; *State v. Hayne*, 4 S. C. 420; *Pelzer v. Campbell*, 15 S. C. 592; 40 Am. Rep. 705; *Ex parte Lynch*, 16 S. C. 33; *Utsey v. Charleston etc. R. R. Co.*, 38 S. C. 399; and other cases since decided. As before remarked, all presumptions are solved in favor of the constitutionality of an act of the legislature, and it devolves upon one who assails it to point out certainly and clearly where it is unconstitutional. This has been undertaken by the respondent in the case at bar, and the duty is now devolved upon this court to pass upon these several propositions.

A municipal corporation, in this state, can only exercise power with which it is clothed by our general assembly: *State v. Maysville*, 12 S. C. 76. And, as we have before seen, <sup>299</sup> the general assembly is only able to vest such municipal corporation with powers within the restrictions contained in our own state constitution and that of the United States. The power of taxation may be given a municipal corporation, but such power, when exercised by such municipal corporation, must not only be exercised according to the charter thereof, but also within the limits of the constitution of the state. Amongst the powers of the corporation of the city of Greenville is the control of its streets, ways, etc., and, within certain well-defined restrictions, such municipality may tax the property within its territorial limits to improve and keep in

repair such streets, ways, sidewalks, etc. The respondent concedes the constitutionality of the act of the general assembly which clothes the city of Greenville with the right, by taxation, to raise the funds necessary to pay for one-third of the cost of the proposed improvements to the roadway and the sidewalks of the city of Greenville, but he goes further, and insists that the whole of such cost should be paid from general taxation in said city.

It is too late in the day to question in our courts that highways (and public streets in our cities and towns are highways) belong to the public. Their being laid out over the lands of private individuals without compensation to the private individuals was maintained in our courts prior to our constitution of 1868: *Lindsay v. Commissioners*, 2 Bay, 38; *Patriot v. Commissioners*, 4 McCord, 541. Since our constitution of 1868, such power exists, but compensation therefor must be first provided: Const. 1868, art. 1, sec. 23. But for highways (and, as before remarked, Main street in the city of Greenville is a highway) belonging to the public, may taxes be laid upon private citizens, who happen to own the land abutting upon such a highway, to improve such a highway, in exoneration of all other citizens who own property in said city? This is a serious question. Many other states, speaking through their courts of last resort, have so affirmed. It is always to be regretted when a difference in judgment upon the same subjects exists in the courts of last resort in the different states of this union.

200 Our oath of office requires us to uphold the laws of this commonwealth, subject to such restrictions thereon as exist in the constitutions of this state and that of the United States. Among the laws of this commonwealth is the organic law as found in the twelfth and fourteenth sections of our constitution of 1868. The latter section is: "No person shall be arrested, imprisoned, despoiled, or dispossessed of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land. When the clauses of the constitution of the state empowering the general assembly to clothe a city, town, or village with the right to levy a tax are considered, we must also consider sections 12 and 14 of article 1 along with them. The sections of our constitution authorizing the general assembly to clothe one of its municipalities with the power of taxation

are sections 8 and 9 of article 9, in these words: "Sec. 8. That the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the general assembly shall require that all the property, except that heretofore exempted, within the limits of municipal corporations, shall be taxed for the payment of debts contracted under authority of law." "Sec. 9. The general assembly shall provide for the incorporation and organization of cities and towns, and shall restrict their power of taxation, borrowing money, contracting debts, and loaning their credit."

Great stress is laid by appellant upon the two decisions of this court—*State v. Hayne*, 4 S. C. 408, and *State v. Columbia*, 6 S. C. 1—as construing the power of taxation by the state itself in the first case, and of taxes laid by a city in the second case. These cases have been recognized by this court repeatedly since they were rendered, and we do not propose to question their ruling authority now. But, when examined, it will be ascertained that *State v. Hayne*, 4 S. C. 408, affirmed the constitutional power of the general assembly of this state to require a license fee to be paid by an attorney in addition to a tax upon <sup>his</sup> property, real and personal; while that of *State v. Columbia*, 6 S. C. 1, affirmed the right of the city of Columbia, under its charter, to require a license fee to be paid by a bank within its limits in addition to a tax upon its property. When these cases are critically examined it will be discovered that the principles presented by the case at bar were in no wise involved then.

We think it will be found that the case of *State v. City Council of Charleston*, 12 Rich. 702, decided by the court of errors in this state in 1880, will throw great light upon the case at bar. In the case just cited the city council had determined that it was expedient to widen George street in said city, and for that purpose had, at an expense of twenty-six thousand dollars, purchased the land on the north side of said street. Under the act of 1850 the city council had appointed commissioners, whose duty it was to ascertain the cost and expense of widening said street, and to assess such cost and expense to be paid by the proprietors of lots and houses on the south side of said street, according to the benefit accruing to such lots. When these assessments were

made such proprietors of lots and houses refused to pay the same, upon the ground that such assessment was "against the laws of the land, in derogation of the right of trial by jury, and is unconstitutional and void." This question arose under the constitution of 1790. In the ninth article the second section provided that "no freeman of this state shall be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner despoiled of his life, liberty, or property, but by the judgment of his peers, or by the law of the land." While Chancellor (afterward Chief Justice) Dunkin was discussing the defense that such power could be successfully referred to and bottomed upon the general power of taxation inherent in every government, he said: "No power is more necessary, none more universally recognized, and, it may be added, none the unjust exercise of which has been, in all countries and all ages, a more fruitful source of complaint and dissatisfaction. Taxes are collected in a summary manner, and without an opportunity to the party of being heard. This legal process (says Judge Nott in *State v. Allen*, 2 McCord, 55), which was originally founded in necessity, has <sup>302</sup> been consecrated by time, etc., *must be an exception to the trial by jury, and is embraced in the law of the land* (italics ours). But in the same case it was held by the court that an imposition by the legislature by the name of a tax, yet wanting its qualities, could not be levied and collected as such without violation of the constitutional rights of the citizen, and the act was null and void. Essential characteristics of any system of taxation (properly so-called) are certainty, equality, universality."

The taxation proposed by the city council of Greenville upon the plaintiff, respondent, under the light furnished by *State v. City Council*, 12 Rich. 702, in order to be legal, must be either directly authorized by the constitution or by "the law of the land." Certainly there is no provision in the constitution which directly, or by necessary implication, authorizes this tax. Is there authority for this tax in "the law of the land"? What does this term, "law of the land," mean, as interpreted by our courts of last resort? Judge O'Neill, in pronouncing the judgment of the court of errors in this state in the case of *State v. Simons*, 2 Speer, 761, thus stated the doctrine: "In this state, taking as our guide *Zylstra's case*, 1 Bay, 384; *White v. Kendrick*, 1 Brev. 471, and *State v. Mazzy*, 1 McMull. 502, there can be no hesitation in say-

ing that these words mean the common law and the statute law existing in this state at the adoption of our constitution (1790). Altogether they constitute the body of the law prescribing the course of justice to which a freeman is to be considered amenable in all time to come."

An examination of our statutes prior to 1790, relating to the improvement of streets and sidewalks, will show that the provisions therein related to the city of Charleston, and that such statutes were confined—that of 1698 (7 Stat. 12) to requiring every inhabitant of Charleston to amend and raise the sidewalk in front of his house in the manner and to the dimensions therein prescribed, on penalty of forfeiting for each house a penalty to be collected under the warrant of a justice of the peace, and that of 1764, to requiring the construction of sewers or drains and sidewalks. These statutes were considered and upheld with reluctance in the two cases of *303 Cruikshanks v. City Council*, 1 McCord, 360, decided in 1821, and *Yeadon v. City Council*, decided in 1828 (cited 12 Rich. 733). And when the act of 1850 (12 Stat. 59, 60) was considered by the court in the case of *State v. City Council*, 12 Rich. 702, the court of errors distinctly repudiated as foreign to our laws any mode of taxation for the improvement of the streets of the city of Charleston which looked to the assessment of property abutting on George street in that city, according to the benefits to be derived from such improvement to such landowners, under the said act of 1850, saying: "As has been said, the general rule knows nothing about *partial assessment for benefits*, or the selection of a portion for a class. Existence of persons or the possession of property, and *not the supposed benefits, are the guide*. When each is taxed according to the value of his property, both equality and certainty may be attained to a reasonable extent; but what may be beneficial, or otherwise, is a matter of opinion or fancy, or vague conjecture" (*italics ours*).

These principles may be deduced from that case: 1. The right to tax persons or property abutting upon a public street for improvements made upon such public streets, in exoneration of other persons or property within the same territorial limits as are the persons or property abutting upon a highway or public street, is opposed to "the laws of the land," and is, therefore, unconstitutional; 2. The right to tax property abutting upon a public street to pay the cost of improvements upon the same, according to the supposed benefit to such

property by such improvement, is distinctly repudiated; and 3. The right to tax the land abutting upon public streets for the cost of improvements of sidewalks and sewers in front of such land is recognized, because such power was exercised by reason of statutes passed before the adoption of the constitution of 1790, and may, therefore, be said to be embraced in "the law of the land." This principle was recognized with reluctance, and only because of previous decisions affirming its existence. We heartily sympathize in the reluctance expressed, and only affirm its existence under the authority of such previous adjudications. When our constitution was adopted in 1868 this case of *State v. City Council*, 12 Rich. 702, had construed the legislative power of ~~the~~ this state, so far as its exercise in the direction of requiring property abutting upon streets to pay for improvements upon the same according to the benefits derived therefrom ~~was~~ concerned; and, as before remarked, there is no provision of such instrument which, directly or indirectly, contravenes the same. The principle is well recognized, that when previous to the adoption of a new constitution there exist laws and decisions construing such laws, and their force and power is not directly or by necessary implication denied in the new instrument, such laws and decisions survive with full force and effect. Such being the case, we do not feel at liberty to disregard them, unless we would assume the responsibility, by reversing such decisions, of asserting the existence in our commonwealth of a different system. This latter step we do not feel at liberty to adopt.

It may be frankly admitted that we have employed much of the time since the hearing of this appeal in considering this very question. This consideration of the subject has tended to increase our respect and acquiescence in the previous policy of the state as being bottomed upon the immutable principles of right in the citizen to the enjoyment of his property, freed from any danger of its being taken from him by any such exercise of arbitrary power; when it is remembered that the fundamental object of government is the protection of the life, liberty, and property of each individual residing within a state; that the exercise of the right of taxation is to be supported by the truth that every individual should contribute of his means to defray the expenses of government to enable it to protect life, liberty, and property within its territorial limits; that such taxation is for a public

purpose, and must be uniform in its imposition upon all the persons and property within a state when for state purposes, and upon all the persons and property within a municipal corporation when for its purposes; that there exists no power, except the police power, in a state to compel an individual citizen to improve his property; and of this class *Charleston v. Werner*, 38 S. C. 488, 37 Am. St. Rep. 776, is an instance, and that the improvement of public streets does not fall within the police power; that the experience of mankind has established <sup>305</sup> as a truth that in republics no greater protection from unjust taxation exists than the power of the people who select the representatives who lay taxes upon them, to change such representatives if the taxing power has been unjustly exercised, but that the beneficent results of this principle of our government in this respect is largely denied, when onerous taxation upon a few to the exclusion of the many is laid by representatives chosen by the many against the united opposition of the few.

Granted, as it should be, that eminent text-writers and the judicial tribunals of many states of this union adopt a different view of this matter, why may not the people of this commonwealth adopt a domestic policy at variance with the views of others? We have a settled policy of our own on other grave subjects—for instance, the indestructibility of the contract of marriage save by death. No reason exists, or can be suggested, why the domestic policy of this state touching the mode of taxation for local improvements should be made to conform to that adopted by any of our sister states.

It is, therefore, the judgment of this court that so much of the judgment of the circuit court as grants a perpetual injunction against the defendant, preventing any assessment upon the property of the plaintiff and other citizens of the city of Greenville, in like plight as the plaintiff, to pay for the cost of improving the roadway of Main street in said city, be affirmed; but where the said judgment enjoins the defendant from levying and assessing upon the plaintiff and others in like plight with him the cost of the improvements to the sidewalks and drains fronting their respective lands, it be reversed.

Mr. Chief Justice McIVER concurred in the result.

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LEGISLATURE—POWERS OF.—The legislature possesses the whole legislative power of the people, except so far as such power may be limited by the

constitution: *People v. Cannon*, 139 N. Y. 32; 36 Am. St. Rep. 668, and note; *In re Madera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106, and note.

**STATUTES—PRESUMPTION IN FAVOR OF CONSTITUTIONALITY OF.**—The presumption is that every legislative act is within the power of the legislature: *In re Madera Irr. Dist.*, 92 Cal. 296; 27 Am. St. Rep. 106. The presumption in favor of the constitutionality of a statute is always indulged: *People v. Haynr*, 83 Cal. 111; 17 Am. St. Rep. 211; *Davis v. Helbig*, 27 Md. 452; 92 Am. Dec. 646, and note.

**MUNICIPAL CORPORATIONS—POWERS OF.**—Municipal corporations can exercise only such powers as are granted by their charters or by general law, either expressly or by necessary or reasonable implication, or such as are incidental to the powers expressly granted, or such as are essential to the objects and purposes of the corporation: *Phillips v. City of Denver*, 19 Col. 179; 41 Am. St. Rep. 230, and note, with the cases collected.

**MUNICIPAL CORPORATIONS—POWER TO TAX.**—The legislature may create corporate bodies for municipal purposes with power to tax: *Hope v. Deadrick*, 8 Humph. 1; 47 Am. Dec. 596, and note; *Whiting v. West Point*, 88 Va. 905; 29 Am. St. Rep. 750, and note. See the note to *Coy v. City Council*, 85 Am. Dec. 544.

**TAXES—NECESSITY FOR EQUALITY OF.**—Taxation must be general and uniform: *City of Lexington v. McQuillan*, 9 Dana, 513; 35 Am. Dec. 159; *Henderson v. London etc. Ins. Co.*, 135 Ind. 23; 41 Am. St. Rep. 410, and note, with the cases collected. See the extended notes to *State v. Hinman*, 23 Am. St. Rep. 26, and *New Orleans v. Great Southern Telephone etc. Co.*, 8 Am. St. Rep. 510.

**MUNICIPAL CORPORATIONS—ASSESSMENTS FOR STREET IMPROVEMENTS.**—Assessments for the improvement of streets may be made against the property peculiarly benefited, but such assessments must be made to the extent only of such peculiar benefits. This rule does not apply to improvements of the sidewalk, which is to be regarded as subservient to the premises to which it is attached, and the expense of improving it may be charged wholly to the owner: *State v. Mayor*, 37 N. J. L. 415; 18 Am. Rep. 729.

## HILL v. WESTERN UNION TELEGRAPH COMPANY.

[42 SOUTH CAROLINA, 387.]

**TELEGRAPH COMPANIES—CIPHER TELEGRAM.**—In an action to recover from a telegraph company for a mistake in the transmission of a cipher telegram it is error to strike from the answer an allegation that such message was unintelligible to such company, intended so to be by the sender, and that the company was not informed of its importance, nor of the probable consequences of a failure on its part to transmit and deliver it promptly and correctly.

*Cothran, Wells, Ansel & Cothran*, for the appellant.

*Graydon & Graydon & Giles*, for the appellee.

388 POPE, J. The present contention is now confined to an allegation that the circuit judge, Judge Witherspoon, erred



when he ordered that paragraph 4 of defendant's answer be stricken out.

To make the issue between the parties more intelligible, it may be stated that the defendant, in deciphering a cipher dispatch addressed to the plaintiff, erred in determining that the sender had written the word "hold," when, in fact, the defendant should have deciphered it as the word "sold." The plaintiff, alleging serious pecuniary loss from this failure of the defendant, has brought this action for five hundred dollars damages. In the answer of defendant, amongst other things, in paragraph 4 he alleges: "IV. That said message was written in cipher, unintelligible to the defendant or its said agent, and was so intended to be by the said Fewell [the sender]; that the defendant was not informed of the importance of said message, nor of the probable consequence of a failure on his part to transmit and deliver the same correctly and promptly."

Now, if the facts here alleged are necessary as the basis of a proposition of law which the defendant is entitled to have considered as a part of its defense to plaintiff's present action, it is evident that the circuit judge has erred. Otherwise he has not. In the light of our decided cases of *Aiken v. Telegraph Co.*, 5 S. C. 371, and *Pinckney v. Western Union Tel. Co.*, 19 S. C. 71, 45 Am. Rep. 765, and especially in view of the very recent decision of the United States supreme court in the action of *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, we are forced to conclude that the circuit judge erred in striking this paragraph from the answer. We avoid saying more, because all these matters must necessarily come before the circuit court for adjudication, and lest we might inadvertently express some opinion on the merits of this interesting controversy.

It is the judgment of this court that the order of the circuit judge, in so far as it orders paragraph 4 stricken from defendant's answer, be reversed.

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**TELEGRAPH COMPANIES—LIABILITY FOR CIPHER TELEGRAMS.**—It is but a reasonable requirement that the importance of a cipher message and of its speedy as well as accurate transmission should be made known to the operator if the company is to be held responsible for serious damages: *Cannon v. Western Union Tel. Co.*, 100 N. C. 300; 6 Am. St. Rep. 590, and note. Telegraph companies are not charged with knowledge of the importance of delivering cipher dispatches: *Western Union Tel. Co. v. Adams*, 75 Tex. 531; 16 Am. St. Rep. 920, and note. See, especially, the note to *Western Union Tel. Co. v. Wilson*, 37 Am. St. Rep. 134, and the extended note to *Western Union Tel. Co. v. Cooper*, 10 Am. St. Rep. 786.

## FROST v. BERKELEY PHOSPHATE COMPANY.

[42 SOUTH CAROLINA, 402.]

**NUISANCE—INSTRUCTIONS—LAWFUL USE.**—The question as to what constitutes unreasonable and unlawful use of premises, as well as to what constitutes an unlawful and unreasonable injury to other property arising from such use, is a question of law, and cannot be submitted to the jury.

**NUISANCE—INJURY ARISING FROM LAWFUL BUSINESS.**—If one uses his own land for the prosecution of some business from which injury to his neighbor must necessarily or probably ensue, he is liable if such injury does result, though he may have used reasonable care in the prosecution of such business.

**NUISANCE—LIABILITY.**—One who, by maintaining a nuisance, inflicts an injury upon another is liable for the damages caused thereby, although the party injured has also sustained injury from other causes.

**NUISANCE—BURDEN OF PROOF.**—Upon a showing that property has been injured by a nuisance, the burden is upon the party maintaining the nuisance to show that the injury complained of proceeds from other and entirely separate causes.

*McCrady & Bacot*, for the appellant.

*Mitchell & Smith*, for the appellee.

407 **McIVER, C. J.** The plaintiff brought this action to recover damages from the defendant company for the injury done to plaintiff and his property by reason of the noxious gases generated in defendant's mill, located very near by, and at some points adjoining, plaintiff's land, and erected for the purpose of manufacturing commercial fertilizers. It is alleged in the complaint that in the preparation and manufacture of these fertilizers "one of the elements in the preparation is the manufacture, in very large quantities, of sulphuric acid, 408 in the manufacture of which acid are produced certain gases, fumes, or vapors of very injurious results to vegetable life, in some cases destructive of it altogether, and also highly deleterious to animal life"; and it is further alleged that these noxious gases, fumes, and vapors thus escaping from defendant's mill have greatly injured, and to some extent entirely destroyed, plaintiff's crops and other vegetation growing on his land; and have proved so detrimental to health as to render plaintiff's premises unfit for habitation. The plaintiff offered testimony tending to prove these allegations, and, on the other hand, testimony was offered by the defendant tending to contradict the same. The case was submitted to the jury, under the charge of his honor, Judge Aldrich, who found a verdict for the defendant,

and plaintiff appeals upon the several grounds set out in the record, which practically impute two errors to the charge, which will hereinafter be stated; but we think it due to the circuit judge that his charge, as well as the exceptions thereto, should be incorporated in the report of the case.

The first error imputed to the circuit judge is in charging the jury as follows: "A man has the right to engage in any lawful occupation, or to use his premises in any proper and lawful industry; but, in the exercise of his rights, he must so use his property as not to *unlawfully and unreasonably* injure his neighbor's property. If he does so use his property in an *unlawful and unreasonable* manner, as to injure his neighbor, then, as to that neighbor, that would be a nuisance, and for that nuisance that neighbor would have the right to bring action in the civil court and demand compensation in the way of damages"; and in stating to the jury as the gist of this case: "Is the Berkeley Phosphate Company so operating and conducting its business as, by the escape of these gases and vapors, as alleged in this complaint, to injure, in an *unreasonable and unlawful manner*, Mr. Frost's property?" We have italicized the objectionable words in these two extracts from the judge's charge simply for the purpose of indicating the point of the objection.

It seems to us that this charge is open to two objections: 1. That it left to the jury the decision of a question of law; for we <sup>400</sup> do not find anywhere in the charge any thing to indicate what would be an unreasonable or an unlawful use of the defendant's premises, or what would constitute an unreasonable or an unlawful injury to the plaintiff's property, and the jury were left without any rule or principle by which to determine whether Mr. Frost's property was unreasonably or unlawfully injured by the defendant. If, therefore, the jury had been ever so well satisfied that the property of the plaintiff had been very seriously injured by the use to which defendant had put its own property, they could not, under this instruction, have found for the plaintiff without further determining the question whether the defendant had so used its own property as to unreasonably and unlawfully injure the property of the plaintiff; for the determination of which they had been furnished with no rule or principle by the circuit judge. How the jury could determine whether the defendant had made a lawful use of its premises, without any

instruction as to what would be a lawful use, it is difficult to understand.

The second objection to this charge is, as it seems to us, that it unwarrantably limits the operation of the maxim, *Sic utere tuo ut alienum non lædas*, so as to allow the owner of a tract of land to so use his own land in the prosecution of any lawful business as would necessarily or probably injure his neighbor, provided he takes all reasonable care to prevent such injury. This we do not understand to be the law. On the contrary, we think if one uses his own land for the prosecution of some business from which injury to his neighbor would either necessarily or probably ensue, he is liable if such injury does result, even though he may have used reasonable care in the prosecution of such business. This doctrine is supported not only by reason, but by the weight of authority, as is shown by the cases cited by appellant's counsel. The rule is well stated in a note in 5 American and English Encyclopædia of Law, at page 3, in these words: "In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must, at his peril, see to it that such injury or such violation does not follow, or he must expect to respond <sup>410</sup> in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed."

In the case of the *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595, a case very much like the one under consideration, it was held that "no principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner for which an action will lie; and this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in the conduct and management of the business": Citing *Attorney General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 147; *Pinckney v. Evans*, 4 L. T., N. S., 741; *Stockport Water Works v. Potter*, 7 Hurl. & N. 160; *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. 330. Again, in the same case, it is said: "We cannot agree with the appel-

lant that the court ought to have directed the jury to find whether the place where the factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a reasonable use, and, if they should so find, the verdict must be for the defendant. . . . Nor can any use of one's own land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property"; and the learned judge proceeds to show that the only case which gives countenance to the view contended for by appellant is *Hole v. Barlow*, 4 Com. B., N. S., 334, which had been distinctly repudiated in the subsequent cases of *Bamford v. Turnley*, 31 L. J. Q. B. 286, and *Tipping v. St. Helen Smelting Co.*, 4 Best & S. 608.

In *Wilson v. City of New Bedford*, 108 Mass. 261, 11 Am. Rep. 352, the case of *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. 330, afterward carried to the house of lords, which, respondent contends, has been repudiated in this country, was cited with approval, and the following language of Lord Cranworth used in that case (*Rylands v. Fletcher*, 3 H. L. Cas. 330) is quoted in the Massachusetts case: "If a person<sup>411</sup> brings or accumulates on his land any thing which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage." In *Bamford v. Turnley*, 31 L. J. Q. B. 286, the jury were instructed that, if they thought the spot was convenient and proper, and that the use by the defendant of his property was, under the circumstances, a reasonable use of his own land, he would be entitled to a verdict; but, upon appeal, these instructions were held to be erroneous, and that it was no answer in an action for a nuisance creating actual annoyance and discomfort in the enjoyment of neighboring property that the injury resulted from a reasonable use of the property.

In *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184, it was held that a person who uses his property in such a manner as necessarily tends to injure the property of another is liable to that other for any injury which may result from such use, without regard to considerations of care and skill therein. In that case the court quotes the following language from Blackstone's Commentaries, book 3, chapter 13:

"If one erects a smelting-house for lead [or for the same reason a fertilizer factory in which sulphuric acid is generated] so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. And by consequence it follows that if one does any other act in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent upon him to find some other place to do that act, where it will be less offensive." In that case, also, *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. 330, was recognized.

In the case of *Loses v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, relied on by respondent, the action was to recover damages for injury done to plaintiff's property by the explosion of a steam-boiler used on defendant's premises, and it was held that the use of such a steam-boiler in such a manner that it is not a nuisance would not render defendant liable without proof of fault or negligence on his part. But that was a very different case from this, for there there was no evidence that the use of a steam-boiler <sup>412</sup> on defendant's premises would necessarily or probably cause any injury to a neighboring proprietor, while here there is evidence tending to show that a fertilizer factory in which sulphuric acid is generated will necessarily, or at least very probably, cause injury to the neighboring proprietors by reason of the escape of noxious and poisonous gases. In that case it was stated, incorrectly as we think, that the case of *Rylands v. Fletcher*, L. R. 3 Eng. & Ir. App. 330, "is in direct conflict with the law as settled in this country." But the same court at the same term held, in the case of *McKeon v. See*, 51 N. Y. 300, 10 Am. Rep. 659, that the plaintiff was entitled to an injunction to restrain the defendant from using machinery propelled by steam-power, where the evidence showed that the plaintiff's buildings on the adjacent lot were actually injured by the jarring and shaking caused by the use of such machinery. In the last-mentioned case the case of *Tipping v. St. Helen Smelting Co.*, 4 Best & S. 608, is cited with approval.

In the *Appeal of Pennsylvania Lead Co.*, 96 Pa. St. 116, 42 Am. Rep. 534, it was held that the plaintiff was entitled to an injunction to restrain the company from carrying on lead smelting works on its own premises, where the evidence tended to show that such works emitted offensive, poisonous, and noxious fumes and vapors, producing danger to animal

and vegetable life on adjoining premises. In a note to that case the case of *Pennoyer v. Allen*, 56 Wis. 502, 43 Am. Rep. 728, decided by the supreme court of Wisconsin, in January, 1883, is cited, in which the action was to recover damages for the maintenance of a tannery on the defendant's premises, adjoining those of the plaintiff, and the question was distinctly presented, whether the fact that the tannery was conducted and operated in a reasonable and proper manner, so that no odors of a disagreeable character were sent forth except such as are incident to a tannery properly conducted, would be a defense to the action. The court held that this would be no defense, saying: "The ownership of land carries with it the rightful use of the atmosphere while passing over it. Title to land gives to the owner the right to impregnate the air upon and over the same with such smoke, vapor, and smells as he desires, provided he does not contaminate the <sup>413</sup> atmosphere to such an extent as to substantially interfere with the comfort or enjoyment of others, or injure the use of their property. . . . When such comfort and enjoyment are so impaired, and compensation is demanded, it is no defense to show that such business was conducted in a reasonable and proper manner, and with more than ordinary cleanliness, and that the odors sent over and upon such adjacent premises were only such as were incident to the business when properly conducted."

See, also, *Baltimore etc. R. R. Co. v. First Baptist Church*, 108 U. S. 317, in which the action was to recover damages for injuries sustained by the plaintiff below arising from the noise, smoke, and odors emanating from the engine-house and workshops of the railroad company, constructed and maintained on a lot adjoining the church building, in the city of Washington, where the court, in response to a defense set up by the railroad company that their charter permitted them to enter the city of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, used this language: "The grant of powers and privileges to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of those powers and privileges." And again, the court said: "If, as asserted by the defendant, the noise, smoke, and odors which are the cause of the discomfort and annoyance to the plaintiff are no more than must necessarily arise from the nature of the business

carried on, with an engine-house and workshop as ordinarily constructed, then the engine-house and workshop should be so remodeled and changed in their structure as to prevent, if that be possible, the nuisance complained of; and, if that be not possible, they should be removed to some other place, where, by their use, the plaintiff would not be thus annoyed and disturbed in the enjoyment of its property": See, also, *McAndrews v. Collierd*, 42 N. J. L. 189; 36 Am. Rep. 508; *Heeg v. Licht*, 80 N. Y. 579; 36 Am. Rep. 654; *Laffin etc. Powder Co. v. Tearney*, 131 Ill. 322; 19 Am. St. Rep. 34; *City of Tiffin v. McCormack*, 34 Ohio St. 638; 32 Am. Rep. 408; *Euler v. Sullivan*, 75 Md. 616; 32 Am. St. Rep. 420, affirming *Susquehanna Fertilizer Co. v. Malone*, 73 Md. 268; 25 Am. St. Rep. 595.

<sup>414</sup> We think, therefore, that plaintiff's first exception should be sustained.

The second error imputed to the circuit judge is in instructing the jury that "if the injury is in part the result of vapors, as charged in the complaint, and in part the result of other causes, the verdict must be for the defendant, unless the testimony establishes that the injury would not have resulted except for the vapor charged as causing the alleged injury." This instruction was erroneous, or, to say the very least of it, was misleading. Under this instruction the jury might very well suppose that, even if they came to the conclusion that the vapors emanating from the defendant's mill did injure the plaintiff's property, yet, if they at the same time believed that a part of the injury sustained by the plaintiff was due to other causes, for example, the work of the worm referred to in the testimony as the borer, they could not find for the plaintiff. This we do not understand to be the law. The fact that one has sustained injury at the hands of another, if it appears that he has also sustained injury from causes other than the act of the wrongdoer, will not, in our judgment, relieve the wrongdoer from liability to respond in damages for the injury which he has caused.

Another objection to this portion of the charge is that it imposed upon the plaintiff the burden of proving a negative. The charge necessarily implied that it was not sufficient for the plaintiff to show that his property had been injured by the noxious gases escaping from the defendant's mill, but it was necessary for him to go further, and show that the injury of which he complained was not due to any other cause. If,



as matter of fact, the injury complained of by the plaintiff did proceed from other causes, that was a matter of defense to be shown by the defendant.

The judgment of this court is, that the judgment of the circuit court be reversed, and that the case be remanded to that court for a new trial.

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**NUISANCE—QUESTION FOR JURY.**—The question whether a thing is a nuisance must be settled as a question of fact: *Village of Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524; *Callanan v. Gilman*, 107 N. Y. 360; 1 Am. St. Rep. 831; *Bell v. Ohio etc. R. R. Co.*, 25 Pa. St. 161; 64 Am. Dec. 687.

**REAL PROPERTY—DAMAGES FOR LAWFUL USE OF ONE'S PROPERTY.**—One must use his property so as not to injure his neighbor: *Beatrice Gas Co. v. Thomas*, 41 Neb. 662; 43 Am. St. Rep. 711, and note; but there are many cases in which the lawful use of one's property causes injury to adjacent property, for which there is no remedy because no right of adjacent owners has been invaded: *Booth v. Rome etc. R. R. Co.*, 140 N. Y. 267; 37 Am. St. Rep. 552, and note. To the same effect see *Barnard v. Sherley*, 135 Ind. 547; 41 Am. St. Rep. 454; and *Barrows v. City of Sycamore*, 150 Ill. 588; 41 Am. St. Rep. 400.

**NUISANCE.—LAWFUL BUSINESS:** See the extended notes to *Appeal of Pennsylvania Lead Co.*, 42 Am. Rep. 540; *Rouse v. Martin*, 51 Am. Rep. 467; and the note to *Sullivan v. Royer*, 1 Am. St. Rep. 54.

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## RABB v. PATTERSON.

[42 SOUTH CAROLINA, 528.]

**RENTS AND PROFITS—LIABILITY OF BONA FIDE OCCUPANT.**—One who takes possession of land under a bona fide, though mistaken, claim of title is required to account only for the rents and profits actually received, and not for the rental value of the land. His executor is liable only for whatever amount could have been recovered from the testator.

**RENTS AND PROFITS—LIABILITY OF OCCUPANT.**—One in possession of land under an honest, though mistaken, claim of title must account for all the rents and profits received by him while so in possession, and not for those only which accrue after the adverse claim is declared.

**RES ADJUDICATA—RENTS AND PROFITS.**—The failure of the true owner to assert a claim for rents and profits in an unsuccessful action brought against him by a party in possession to establish the title to the land does not estop the true owner from afterward maintaining an action to recover such rents and profits.

**RENTS AND PROFITS—MEASURE OF RECOVERY.**—One in possession of land under an honest, though mistaken, claim of title and right is liable to the true owner only for the rents and profits actually received by him, less the amount expended in the payment of costs in an action to recover such rents and profits from a third party.

**RENTS AND PROFITS COLLECTED FROM TRUST LANDS ARE TRUST FUNDS** in favor of the true owner while in the hands of one who has knowledge of the trust. A judgment to the contrary, reversed on appeal, does not release the funds from the trust.

**RENTS AND PROFITS—TRUST FUNDS.—THE RECOVERY OF A PERSONAL JUDGMENT** by a *cestui que trust* against his trustee for the rents and profits of land held in trust does not preclude him from recovering from the grantee of such trustee, not made a party to the former suit, such rents and profits received by him from his grantor. The estate of such grantee, in case of his death, is liable for the rents and profits so received.

**APPEAL.—OBJECTION THAT RECOVERY OF COSTS IS BARRED** because an injunction is violated in bringing suit cannot be raised for the first time on appeal.

*A. S. & W. D. Douglass*, for the appellant.

*Ragsdale & Ragsdale, and McDonald, Douglass & Obear*, for the appellee.

534 POPE, J. This appeal presents some additional phases in a controversy that has been conducted in our courts since 1884. Its history may be traced in *Rabb v. Flenniken*, 29 S. C. 278, *Rabb v. Flenniken*, 32 S. C. 194, and *Patterson v. Rabb*, 38 S. C. 138, and, having been so fully ventilated already, will require but little further statement. Some reference to the facts ought, however, to be made, to make the present issue intelligible.

A tract of land lying in Fairfield county, in this state, was conveyed to a trustee in 1867. In 1877, that trustee, in flagrant violation of his trust, conveyed the land to one Flenniken, who was fully cognizant of that fact. Flenniken sold the land to an unlettered colored man, taking his bond and mortgage to secure the purchase money. This bond and mortgage were assigned to Giles J. Patterson for value. After the assignment thereof to said Patterson the colored man reconveyed the land to Flenniken. Action was brought by the *cestui que trust* named in the trust deed against Flenniken to uproot the conveyance to him of the trust lands in 1884, and a notice of *lis pendens* was then filed. In 1885 said Flenniken conveyed his entire estate to James A. Brice, as assignee, for the benefit of his creditors. Giles J. Patterson brought an action against James A. Brice as assignee and to foreclose his mortgage, and refused to make Cassandra H. Rabb a party to his suit; and this action of Patterson ripened into a judgment in June, 1887, including therein a requirement that James A. Brice, as assignee, pay to said

Patterson \$201, which Brice, as assignee, had realized from rents of the trust lands. Patterson purchased the lands under his judgment, and went into possession thereof in 1888. The supreme court filed its judgment in favor of Rabb and against Flenniken in 1890. In order to retain his possession of the land as the owner thereof, Patterson began his action in 1890, which terminated adversely to all his claims in 1893.

However, in 1891, Mrs. Rabb and her new trustee began her action against Patterson to collect the \$201, which had been collected by him from Brice for the rents in 1886 and 1887, and also to have him pay the five years' rent which had accrued while he was in possession, and this is the action we are now <sup>535</sup> called upon to consider. It should be stated that Patterson having died in December, 1891, the action was continued against his personal representative, Mrs. Patterson, as his executrix. She vigorously denied any responsibility therefor on several grounds. All the issues came on to be tried before his honor, Judge Ernest Gary, who, after all the evidence, oral and documentary, had been considered by him, filed his decree in January, 1894, wherein he adjudged that the plaintiffs recover of the defendant, Mrs. Patterson, as executrix, \$800 for rents and profits during the five years the land was in Giles J. Patterson's control, and an additional sum of \$201 received by him of Brice, as assignee, for rent, but the complaint was dismissed as to Brice, as assignee. From this decree Mrs. Patterson has appealed upon ten grounds, which we will consider in their order.

"1. Because his honor erred in holding that on the 26th day of July, 1893, Judge Witherspoon passed an order continuing said cause in the name of the executrix, the said M. Virginia Patterson." Strict accuracy in stating the result of the order of Judge Witherspoon was not observed by Judge Gary in his decree, for really Judge Witherspoon declined to pass the order referred to, on the ground that, under a decision of court (*Parnell v. Maner*, 16 S. C. 348), the plaintiffs had the right to continue the cause against the executrix without any order therefor from the circuit court. However, this inadvertency on the part of Judge Gary is immaterial, and needs no further attention.

As we will discuss the principles of the law governing the second, third, and fourth exceptions, we will consider them in a group. They are as follows: "2. Because his honor erred in finding and holding that Giles J. Patterson entered into

and was in possession of the premises described in the complaint in this action simply as a trespasser; 3. Because his honor erred in his conclusion of law that the defendant, M. Virginia Patterson, as the executrix of the will of said Giles J. Patterson, deceased, is chargeable with the rental value of the said premises for the years covering the period the said Giles J. Patterson was in possession of the same, and in directing judgment to be entered against said defendant, as executrix as <sup>was</sup> aforesaid, for the sum of \$800, after deducting therefrom \$64.17, the amount of taxes paid by Giles J. Patterson on said premises; 4. Because his honor erred in not holding that the said defendant, as executrix as aforesaid, if liable at all in this action, can only be held liable for the rents and profits actually received, which were shown by the testimony to amount to \$502.18, out of which taxes assessed on said premises were paid amounting to \$64.17."

It seems to us that the circuit judge erred in holding that the appellant's testator went into possession of the land in question as a bald trespasser; on the contrary, we think he took possession under a bona fide claim of right as authorized by a judgment of the court. The fact that the court has eventually held that the claim of the testator was unfounded cannot affect the character of his possession. There is no doubt of the fact that Mr. Patterson went into possession as the purchaser at a sale made under a judgment of foreclosure obtained in an action for the foreclosure of a mortgage brought against a person who then held the legal title to the mortgaged premises; and there is little doubt that he then supposed, and had reason to suppose, that he had acquired a good title to the premises, for the proceedings show that two of the circuit judges and one of the justices of this court were manifestly of that opinion. We think, therefore, that even if Mr. Patterson were now living, he could only be required to account for the rents and profits actually received by him, and not the "rental value" of the premises. As was said by Johnson, C., in his circuit decree in *Johnson v. Lewis*, 2 Strob. Eq. 160, approved afterward by the court of appeals: "The rule is that if one comes tortiously into possession of an estate, he ought not to be spared, and ought to be charged to the extent of what it was capable of producing; but if he enter rightfully, and can show what the actual income was, that will determine his liability. . . . The same principle ought, I think, to apply when the party in possession believes that the right of prop-

erty was in himself, and has been thrown off his guard by the belief that he was not liable to account." This view was fully sustained <sup>527</sup> by the cases of *Jones v. Massey*, 14 S. C. 292; *Thomson v. Peake*, 38 S. C. 440, and *Bradford v. Buchanan*, 39 S. C. 239.

It seems to us that the point of distinction lies in the fact that one who goes into possession of the land of another as a bald trespasser, or, as some of the cases express it, acquires the possession by force or fraud, he is entitled to no consideration at the hands of the court, and the strictest rule of accountability is, therefore, applied to him; but when one goes into possession under bona fide claim of right, though it may eventually prove to be unfounded, he is not to be punished for his honest mistake, but is only required to account for such rents and profits as he has actually received, and not for the "rental value" of the premises. To show that one who goes into possession under an honest, though mistaken, belief of right, is not to be treated as a trespasser when called upon to account for rents and profits, see what is said by Johnson, C., in his circuit decree in *Rainsford v. Rainsford*, McMull. Eq. 336, and by Harper, C., in delivering the opinion of the court of appeals in *Riddlehoover v. Kinard*, 1 Hill Eq. (S. C.), 381. The cases cited by counsel for respondent are not in conflict with this view, for in *Boyce v. Boyce*, 6 Rich. Eq. 302, the defendant Starr not only went into possession as a bald trespasser, but he also acquired possession by an open defiance of an order of injunction made in a case to which he had made himself a party by proving his claim. In *Kirkpatrick v. Atkinson*, 4 S. C. 126, the defendant Atkinson acquired possession by fraud, and in *Maner v. Wilson*, 16 S. C. 469, the defendants went into possession under a paper which, though in the form of an absolute deed, they knew was intended as a mortgage.

But even if Giles J. Patterson could be regarded as a trespasser in taking possession of this land (and we have just held that such was not the case), it is very clear that his executrix cannot be charged with any thing more than the amount actually received, the amount that actually inured to the benefit of her testator's estate. The foundation of plaintiffs' claim, their cause of action, so to speak, was the alleged trespass of the testator, and under the maxim, *Actio personalis moritur cum persona*, the plaintiffs' cause of action against the testator would not <sup>528</sup> survive against his exec-

utrix except to the extent of enabling plaintiffs to recover against appellant whatever amount may have inured to the benefit of her testator's estate from his alleged tort: See *Chalk v. McAlily*, 10 Rich. 92; *Chaplin v. Barrett*, 12 Rich. 284; 75 Am. Dec. 731; *Huff v. Watkins*, 20 S. C. 477. The act of 1892 (21 Stat. 18, approved December 20, 1892) cannot apply to this case, and has not, therefore, been considered. The principles here announced dispose of the second, third, and fourth exceptions.

The fifth exception is in these words: "Because his honor erred in not holding and adjudging that, under the circumstances of this case, the liability of Giles J. Patterson or his executrix to account for the rents and profits of said premises should be restricted to the 1st of April, 1890, when the deed of conveyance by David R. Flenniken to the plaintiff Edwin J. Rabb, as trustee, was made under the decree in the case of *Cassandra H. Rabb v. D. R. Flenniken*, or to the 12th of July, 1890, when the plaintiffs were enjoined from taking possession of said premises under order in the case of *Giles J. Patterson v. Cassandra H. Rabb et al.*" We are not impressed by this exception. Giles J. Patterson took possession of these lands early in 1888. He and his estate have had the rents and profits since that date. Under the decision of this court in *Patterson v. Rabb*, 38 S. C. 138, it has been determined that this property was not his on January 1, 1888, nor at any moment after that time; on the contrary, this court decided that this was the property of the plaintiffs all that time. Therefore, to excuse him or his estate from paying rent from January 1, 1888, to April 1, 1890, or July 12, 1890, would be to take the property of Mrs. Rabb and give it to the estate of Patterson. We have been pointed to no good reason for such course on our part. In our judgment it would be against equity and good conscience. Let this exception be overruled.

"6. Because his honor erred in not holding and adjudging that the plaintiffs by their neglect to demand and obtain judgment for rents and profits in the case of *Giles J. Patterson* (M. V. Patterson as trustee for herself and children, subsequently substituted as plaintiffs) v. *Cassandra H. Rabb* <sup>529</sup> *et al.*, and by their failure to avail themselves of the reference or remedy in that action provided by section 243 of the Code of Procedure, are precluded from obtaining a decree for rents and profits in this action." It must be remembered that the action of *Patterson v. Rabb* was that brought by Patterson him-

self for his own purposes, namely, the upholding of his title to the trust lands, and this was the issue Mrs. Rabb was brought to take part in settling. When A sues B to recover a specific tract of land or a specific sum of money, B may content himself with defending himself against the claim of A as set up in his complaint; he need go no further, although he may go further if he chooses. Not so, however, with A; he must exhaust himself in regard to the specific tract of land or specific sum of money sued for; afterward, he cannot make as a cause of action against B any claim he had as to the land or to the money.

So far as section 243 is concerned, it may be remarked that it does provide for a bond to indemnify the opposite party from damages, and that this remedy may be had in the case to ascertain damages, "by a reference or otherwise"; but then this bond only operated from July 12, 1890; and if it was permissible to announce that it covered rents and profits as well as other items of "damages," what would become of the rents and profits for two and a half years before that date? and also what would become of the \$201 received from James A. Brice, as assignee, in 1887? We think it better to say that the term "damages" may cover rents and profits in some cases, but it must be evident that to so hold in this action would be to require the plaintiffs to split up their claims for rent into several actions. Besides, it must be remembered that such "damages," under the injunction bond, may not only be obtained under "reference" proceedings, but the same section of the code provides that it may be done "otherwise" than under "reference." To pursue the subject further is unnecessary—it is untenable.

The seventh exception is as follows: "Because his honor erred in holding that the said defendant, as executrix as aforesaid, is also chargeable with the sum of \$201, which was <sup>540</sup> applied in part to pay costs and balance (\$185.63) paid to Giles J. Patterson under order of the court in the case of *Giles J. Patterson v. James A. Brice*, as assignee of the estate of David R. Flenniken, and in directing the entry of judgment therefor in favor of plaintiffs against this defendant, as executrix as aforesaid, when no appeal was taken from said order, and at the time of such payment there was no valid existing order impounding the rents in the hands of Brice, as assignee." The decree of the circuit judge, it seems to us, contains a slight error in the amount charged against the

appellant, on account of the money received from Brice, as assignee, by Patterson, and which was realized from the rents of the premises in question. While there is no doubt that the money in the hands of Brice, as assignee, arising from that source was realized from the lands adjudged to belong to the plaintiffs, yet neither Patterson nor his executrix can be charged with any thing more than they actually received, and the undisputed testimony is that Patterson received only the sum of \$185.63, and the balance of the \$201 was applied to the costs incurred by Brice, as assignee, on the action for foreclosure. Brice was a party to this action, and the plaintiffs did not except to that part of the decree which dismissed the action as to him. All the plaintiffs can recover against Mrs. Patterson as executrix, on account of this \$201, is the sum of \$185.63.

"8. Because his honor erred in holding and concluding that the sum of money paid by James A. Brice to Giles J. Patterson under the order of court was a trust fund belonging to the plaintiffs; and that Giles J. Patterson received the fund with the knowledge of the trust attached to it when Judge Wallace by his decree, which was then of force, had dismissed the complaint in the case of *Cassandra H. Rabb v. D. R. Flenniken*." We do not see how these funds were not trust funds. They came as rent from the trust lands, and Cassandra H. Rabb, under the terms of the trust deed, was to receive such rents from her trustee. Certainly Mr. Patterson knew all about these matters. As to the decree of Judge Wallace, dismissing the complaint, operating to release the trust character from those funds, we cannot admit such a doctrine, <sup>541</sup> when it is recalled that an appeal was taken from such decree, and was sustained by this court. The exception is not tenable.

"9. Because his honor erred in not holding that the plaintiff, Cassandra H. Rabb, having elected to take a personal judgment for rents and profits, embracing the years 1886 and 1887, against David R. Flenniken in the case of *Cassandra H. Rabb v. David R. Flenniken*, to which action neither James A. Brice, as assignee, nor Giles J. Patterson was made a party, the claim of rents and profits for said years was merged in said judgment against David R. Flenniken, and there is no privity between the plaintiffs and Giles J. Patterson or his executrix, or equity, which would entitle the plaintiffs in this action to recover the said sum of \$201 from the defendant,



M. Virginia Patterson, as executrix as aforesaid." We confess ourselves unable to see what connection Mrs. Patterson, as executrix of Giles J. Patterson, has with the proceeding of the plaintiffs against David R. Flenniken, and, therefore, we cannot perceive the pertinency of any inquiry by us into what entered into that judgment. If it is true that Giles J. Patterson received \$201 of the trust estate belonging to the plaintiffs here, and that he had no legal right to any part of that fund, it makes no difference what other people have been unsuccessfully sued to try and recover this fund. To enable the present plaintiffs to recover this fund from the estate of Giles J. Patterson, deceased, no privity need exist. It is the old case of a trust fund being taken possession of by one not entitled to hold it; when the trustee, or *cestui que trust*, who is entitled to hold it, comes and sues for it, he is entitled to a judgment for its recovery. Let the exception be overruled.

"10. Because his honor erred in not adjudging that the plaintiffs, having commenced this action in violation of the order of an injunction made in case of *Giles J. Patterson v. Cassandra H. Rabb et al.*, which restrained them, their attorneys, their agents, and servants, from collecting, receiving, or intermeddling with the rents and profits of the premises described in the complaint, should not be allowed costs against the defendant." We are inclined to think this point as now made comes too late. Certainly the circuit judge <sup>542</sup> made no express order on the subject of costs. We will not undertake to pass upon a question of this character raised for the first time in this court. At all events, costs follow the result except in equity cases, when the circuit judge may order differently if he sees proper. It seems to us that this question, at best, comes too late. If plaintiffs were enjoined from suing, that should have been so adjudged. Not having been so adjudged, this court will assume that all things were rightly done in the court below, no showing to the contrary having been made.

It follows from our preceding observations that the circuit court decree must be modified by having that decree fix the liability of Mrs. Patterson, as executrix, for the sum of \$502.18, as the rents for which she, as said executrix, must pay in lieu of \$800, less the amount paid for taxes as ascertained by the decree; and that she, as said executrix, must pay the sum of \$185.63 on account of the amount received by Giles J. Pat-

terson from James A. Brice, as assignee, instead of \$201; but that in all other respects the said decree shall be affirmed.

It is the judgment of this court that the judgment of the circuit court be modified as herein indicated, and that in all other respects such judgment be affirmed.

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**EJECTMENT—MESNE PROFITS.**—From the time of the demise until the plaintiff is put in possession the defendant is accountable for the profits: *West v. Hughes*, 1 Har. & J. 574; 2 Am. Dec. 539. Computation of rent against a bona fide occupant should begin from the filing of the bill, but, against a mala fide possessor, from his entry, if within the period prescribed in the statute of limitations for an action for mesne profits: *Pugh v. Bell*, 2 T. B. Mon. 125; 15 Am. Dec. 142. The recovery of intermediate damages after regaining possession by ejectment or re-entry is discussed in the extended note to *Anderson v. Hapler*, 85 Am. Dec. 323. The recovery of damages in the nature of mesne profits for use and occupation in actions in ejectment is discussed in the extended note to *Fitzgerald v. Beebe*, 46 Am. Dec. 232.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**SOUTH DAKOTA.**

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**WILLIAMS v. HARRIS.**

[4 SOUTH DAKOTA, 22.]

**APPEAL—ASSIGNMENT FOR BENEFIT OF CREDITORS.**—It cannot be contended on appeal that a conveyance made by a husband to his wife is a general assignment for the benefit of creditors, with preferences, if the record fails to show that he, at the time, was insolvent, and does show that he had other property besides that conveyed to his wife.

**FRAUD—PROOF REQUIRED.**—If the facts and circumstances surrounding the case and directly proved are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires.

**HUSBAND AND WIFE—DEALINGS BETWEEN, AS TO HER SEPARATE ESTATE.** A wife may deal with her husband with respect to her separate estate as though the relationship of marriage did not exist, subject to the conditions prescribed by statute.

**HUSBAND AND WIFE—TRANSFERS OF PROPERTY.**—A transfer of a considerable portion of property by a debtor, when in failing circumstances, to his wife, and immediately after acquiring it, may, unexplained, raise a presumption of fraud. But all taint of suspicion may be removed by showing the utmost good faith in the transaction.

**HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS A CREDITOR.**—If the wife is a creditor of her husband in good faith, he has the right to secure or pay her as he would any other creditor. He may even convey property to her for that purpose, with a fraudulent intent as to other creditors, and the title will not be defeated unless she had knowledge of such intent.

**ACTION** by Annie E. Williams and another against George W. Harris, sheriff, and the John Pritzlaff Hardware Company, to restrain a sale of property on execution. There was a judgment for the plaintiffs and the defendants appealed.

*H. E. Dewey*, for the appellant.

*Crawford & De Land*, for the respondent.

<sup>23</sup> BENNETT, P. J. On the fifth day of August, 1885, W. B. Williams, the husband of Annie Williams, one of the plaintiffs, was the owner of a stock of hardware situated in Pierre, South Dakota. On that day he traded this stock to one Prentice for an undivided one-third interest in ten acres of land, an undivided one-third interest in thirty lots in Prentice & Pettigrew's addition to the city of Pierre, and a quarter section of land six miles from the city. On the same day the trade was made Williams owned another section of land near Pierre, some lots in Harrold, some bills receivable, and some accounts against various persons. Soon after taking the deed from Prentice of the above-described property Williams executed a deed to his wife, Annie E. Williams, one of the plaintiffs, transferring to her the undivided one-third interest in the lots, and the undivided one-third interest in the ten acres of land, for an alleged consideration of thirteen hundred dollars, which deeds were duly recorded August 5, 1885. At the time said deed was executed W. B. Williams was in failing circumstances, and his wife knew he was owing several debts, and that times were dull, but did not know he was insolvent, or any of the particulars in regard to his financial condition. About a year prior to the transfer of the stock of hardware by Williams to Prentice, Williams had a partner <sup>24</sup> by the name of John Pryce, and they were doing business under the firm name of Williams & Pryce. It is alleged that the firm borrowed money from Mrs. Annie E. Williams, for which the firm gave her its promissory notes. Soon afterward the firm dissolved, and Williams continued the business in his own name, assuming the firm's debts. It is also alleged that Williams borrowed money from his wife, for which she held his note. On August 5, 1885, it is alleged there was due on their notes the sum of one thousand dollars. On that day Mrs. Williams surrendered up and canceled their several notes, which were past due, and accepted the deed to the above-described property in full payment of them. The appellant, the John Pritzlaff Hardware Company, being a creditor of the firm of Williams & Pryce and William B. Williams, began a suit to recover an ordinary money judgment against them on the seventeenth day of August, 1885, and attached the property described in the deeds from Williams to his wife, Annie E. Williams. After a hearing upon the merits said attachments were vacated and set aside on the nineteenth day of September, 1885, but the above-named

appellants did not recover judgments on their claims against Williams & Pryce and against said Williams until January 11, 1886; and said judgments were not docketed until the fourteenth day of January, 1886, on which day executions were issued, and placed in the hands of George W. Harris, sheriff, another of the appellants, who levied said executions on the property conveyed to Mrs. Williams by the deed of August 5, 1885. On the eighth and thirteenth days of April 1886, the said Harris, as sheriff, sold said property to the appellants, the Pritzlaff Hardware Company, and delivered to them certificates of sale therefor, which have been recorded. The plaintiff brought this action to cancel these certificates and annul all the proceedings in relation to the sale of this property by the sheriff. The defendant answers, denying the validity of the sale and deed made by Williams to his wife on the fifth day of August, 1885, and alleges that it was fraudulently and collusively made with intent to hinder, <sup>as</sup> delay, and defraud the creditors of W. B. Williams, the husband, and asks that the deed be adjudged null and void, and of no effect. Upon the hearing, judgment was rendered in the court below, annulling the sale under the execution, and the certificates were set aside and canceled, and the defendant enjoined from asserting any claim to said lands, or interfering with the peaceable enjoyment thereof by the plaintiffs, from which judgment this appeal is taken.

In their argument before this court the appellants contended: 1. That the conveyance made by William B. Williams to his wife on the fifth day of August, 1885, should be regarded as a general assignment for the benefit of creditors, but with preferences, which is forbidden by section 4660 of the Compiled Laws. We feel very doubtful if, upon this record, appellants are in position to make this contention. The whole theory of appellants' answer, the theory upon which the case was tried in respect to the defense, was that the deed from Williams to his wife was void because in fraud of creditors, and the relief asked in the answer is that the said deed be declared fraudulent and of no effect, and that the sheriff's certificate of sale under the execution be declared good and operative against this property, and that the sheriff be directed to execute a deed of the same in pursuance of such sale and certificate. The findings of the trial court, and appellants' exceptions thereto, were made upon the issues thus presented. The appellants' assignments of error are

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all upon the same theory, and go to allege error in the trial court in not finding and holding that the deed from Williams to his wife conveyed nothing to her, and that the sheriff's sale did convey it to the defendants as purchasers at such sale. The contention now made in argument in this court, that such deed from Williams to his wife did convey the title to her, but in trust for the benefit of creditors generally of the grantor, Williams, seems inconsistent with appellants' position in the court below, and we think such question was never presented to, or considered by, that court. <sup>26</sup> But passing this, and treating the question on its merits, we think the contention is not maintainable. It was not found by the court that, when the deed was made by Williams to his wife, Williams was insolvent, but it is affirmatively found that the property so transferred did not constitute all the grantor's property. This want of finding as to Williams' insolvency at the time, and the affirmative finding that he still had other property besides that so conveyed to his wife, were not excepted to, but acquiesced in, by appellants. Upon such a record we do not think the conveyance from Williams to his wife could be construed to be an assignment for the benefit of his creditors.

The appellants further contend that the conveyance of the lands and lots made by Williams, the husband, to his wife was fraudulent, and was made to hinder, delay, and defraud creditors, and therefore void. "Fraud" is a difficult thing to define. Courts have skillfully avoided giving a precise and satisfactory definition of it, so various are its forms and colors. It is sometimes said to consist of "any kind of artifice employed by one person to deceive another"; conduct that operates prejudicially on the rights of another, or withdraws the property of a debtor from the reach of creditors: *McKibbin v. Martin*, 64 Pa. St. 356; 3 Am. Rep. 588; *Shoemaker v. Cake*, 83 Va. 5. It is to be inferred or not, according to the special circumstances of every case. It is the judgment of law on facts and intents: *Pettibone v. Stevens*, 15 Conn. 26; 38 Am. Dec. 57; *Sturtevant v. Ballard*, 9 Johns. 342; 6 Am. Dec. 281. Its existence is often a presumption of law from admitted or established facts, irrespective of motive, and too strong to be rebutted: *Belford v. Crane*, 16 N. J. Eq. 265; 84 Am. Dec. 155. Fraud is always a question of fact with reference to the intentions of the grantor. Where there is no fraud there is no infirmity in the deed. Every

case depends upon its circumstances, which are to be carefully scrutinized. But the vital question is always the good faith of the transaction. There is no other test: *United States v. Amistad*, 15 Pet. 594; *Lloyd v. Fulton*, 91 U. S. 485; <sup>27</sup> *Humes v. Scruggs*, 94 U. S. 22; *Knowlton v. Mish*, 8 Saw. 627; 17 Fed. Rep. 198. To establish fraud the evidence is almost always circumstantial. From the nature of the case it can rarely be proved otherwise; and if the facts and circumstances surrounding the case, and directly proven, are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires.

The above may be considered the general principles in relation to fraud, as applied to the ordinary transactions of life. The question of dishonesty in this transaction rests solely upon the ground that it was by an insolvent debtor to his wife. Husband and wife have been made, by legislation, independent legal personages in most, if not all, of the states; the statutes conferring upon married women the power to hold and convey property much the same as though they were single. This fact has sometimes encouraged husbands to confide to the keeping of their wives property which should have been turned over to the creditors of the husband. A debtor, when threatened with insolvency, naturally reposes confidence in his wife, and there may be instances when she becomes wrongfully possessed of funds and property which the law says of right should be diverted to the payment of the husband's debts; but, as was said in *Patton v. Conn*, 114 Pa. St. 183, "a wife can become an honest creditor of her husband, and he may pay an honest debt to her, though, as to other creditors, the claims may appear stale and ancient." In many respects a wife may, under the existing policy of the law, deal with her husband, as regards her separate estate, upon the same terms as though the relationship had no existence. Thus, in a recent case in Massachusetts (*Atlantic Nat. Bank v. Tavener*, 130 Mass. 407), in which the opinion was rendered by Chief Justice Gray, now one of the justices of the supreme court of the United States, it was decided that where the wife loaned her husband, upon the promise of repayment, money constituting a part of her separate estate, a conveyance of land made by him to her through a <sup>28</sup> third person, in repayment of such loan, and free from a fraudulent design, would be valid against his creditors: See, also, *Medsker v. Bonebrake*, 108 U. S. 66; *Tomlinson v. Matthews*,

98 Ill. 178; *Jewett v. Noteware*, 30 Hun, 194; *French v. Motley*, 68 Me. 326; *Grabill v. Moyer*, 45 Pa. St. 530; *Langford v. Thurlby*, 60 Iowa, 105. Transactions between husband and wife, to the prejudice of the husband's creditors, however, are usually scanned closely by the courts, and the good faith in them must be clearly established. As was observed in the case of *Hoxie v. Price*, 31 Wis. 86, "on account of the great facilities which the marriage relation affords for the commission of fraud, these transactions between husband and wife should be closely examined and scrutinized, to see that they are fair and honest, and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors." In all such cases the parties are under the temptation to do themselves more than justice. In *Post v. Stiger*, 29 N. J. Eq. 556, the court says: "A claim by a wife against the husband, first put in writing when his liabilities begin to jeopardize his future, should always be regarded with watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties, alone, uncorroborated by other proof, should be rejected at once, unless their statements are as full and convincing as to make the fairness and justice of the claim manifest": *Lee v. Cole*, 44 N. J. Eq. 328. A transfer of a considerable portion of property by a debtor, when in failing circumstances, to his wife, immediately after acquiring it, may excite suspicion, and, unexplained, may seem a presumption of fraud. But parties may always come in and remove all taint of suspicion by showing the utmost good faith in the transaction. In the case at bar the plaintiff has shown in a very clear and convincing manner that she, on several occasions, had loaned her husband various amounts of money to assist him in carrying on his business, and that these several amounts were <sup>29</sup> evidenced by his promissory notes, which were unpaid on the day the transfer in question was made. Then he stated to her that he had sold his stock of goods for this property and several tracts of land; that he was unable to pay her the money due her in cash, but he would give her this real estate for the notes she held against him. This she assented to, and the transfer was made. Furthermore, the plaintiff shows that the money loaned to her husband was of her own separate estate—money obtained by her from her father's estate, and money earned by her teaching school—and that none of it came from her husband. The separate property rights of



husband and wife, and their independence from each other in business transactions, are carefully defined and established by our statutes: See Comp. Laws, secs. 2589, 2590, 2593, 2594, 2600.

Even the fact that the husband has a fraudulent intent will not defeat the title, unless the wife knows he has such fraudulent intent. In the case of *Rockford etc. Mfg. Co. v. Mastin*, 75 Iowa, 112, a case clearly in point, the court said of the wife: "She was a creditor of her husband, and he had the right to secure and pay her as any other creditor. He conveyed, and she accepted, land in payment for such indebtedness; and it is immaterial if her husband did at the same time sell, substantially, all the property he had, and it is immaterial if it was done hastily, with an apparent design to place the title of the property beyond the reach of the plaintiffs, for the reason that Robert Martin had the right to prefer one creditor to another, and his wife had the right to insist on and accept all she was legally entitled to. The value of the land did not exceed the amount of the indebtedness": See, also, *Buhl v. Peck*, 70 Mich. 44; *Deering v. Lawrence*, 79 Iowa, 610. In the case at bar the testimony of Mrs. Williams and the testimony of Williams is clear and undisputed that the purpose and intent in making the transfer were for the payment of the money loaned by the wife to the firm of Williams & Pryce and to William B. Williams, the grantor. Under the facts established by the evidence the court below was clearly right in its judgment, and is affirmed.

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**FRAUD—HOW PROVED.**—Fraud may be established by proving circumstances which lead fairly, though not irresistibly, to the conclusion of fraud: Note to *Tuteur v. Chase*, 14 Am. St. Rep. 579.

**HUSBAND AND WIFE—DEALINGS BETWEEN.**—A husband and wife may deal with each other concerning property as if no marital relation existed between them: *O'Connell v. Taney*, 16 Col. 353; 25 Am. St. Rep. 275, and note; *Blake v. Blackley*, 109 N. C. 257; 26 Am. St. Rep. 566, and note. Either may convey directly to the other, and, in the absence of fraud, a good title may be conveyed: *O'Connell v. Taney*, 16 Col. 353; 25 Am. St. Rep. 275, and note. A husband may prefer his wife over other creditors: *Cornell v. Gibson*, 114 Ind. 144; 5 Am. St. Rep. 605, and note; *Riley v. Vaughan*, 116 Mo. 169; 38 Am. St. Rep. 586. A husband may give his wife a deed or mortgage to secure a pre-existing *bona fide* debt owing her, and such conveyance, if taken in good faith, is not void as to his other creditors: Note to *Daggett v. Bulfer*, 31 Am. St. Rep. 466. But if the conveyance was made with a fraudulent intent on the part of the husband, and this was known to and participated in by the wife, it is the duty of the jury to find that the conveyance was fraudulent, although a valuable consideration passed: Note to *Second Nat. Bank v. Merrill*, 29 Am. St. Rep. 882.

## O'ROURKE v. CITY OF SIOUX FALLS.

[4 SOUTH DAKOTA, 47.]

**PLEADING—SUFFICIENCY OF DEMURRER.**—A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action is sufficient in form, though it is attempted to take advantage of affirmative facts alleged in the complaint.

**MUNICIPAL CORPORATIONS.—TWO KINDS OF DUTIES ARE** imposed upon a municipal corporation—one for governmental purposes, discharged by the corporation as one of the political subdivisions of the state; the other arising from the grant of some special power, in the exercise of which the corporation acts as a legal individual.

**MUNICIPAL CORPORATIONS.—STATUS OF OFFICERS AS AGENTS.**—In the enactment of ordinances, and in the appointment of officers and agents for their enforcement, a city exercises a governmental authority, and within its limits acts as the representative of the state. Its officers, therefore, are regarded as agents, not of the city, but of the state.

**MUNICIPAL CORPORATIONS.—LIABILITY FOR ACTS OF AGENTS.**—A city is not liable for the nonfeasance or misfeasance of its officers.

**POLICE OFFICERS OF A CITY** are not its servants or agents.

**MUNICIPAL CORPORATIONS.—FIRING CANNON IN STREET.**—A city is not liable for injuries caused by the firing of a cannon in a public street in violation of an ordinance, although the city officers knew that it was to be fired, and made no attempt to prevent it.

**MUNICIPAL CORPORATIONS.—FIRING CANNON IN STREET.—PLEADING NEGLIGENCE.**—In an action against a city to recover for personal injuries caused by the firing of a cannon in one of its public streets at night, and in violation of an ordinance, an averment in the complaint that the city had the power to light its streets and had undertaken to exercise it, and that the accident occurred because there was no light at the place of the accident, does not sufficiently charge negligence. The absence of a light at that particular time and place might be accounted for in many ways consistent with freedom from legal negligence.

**ACTION** by Maggie O'Rourke against the city of Sioux Falls to recover for personal injuries sustained by the firing of a cannon, negligently permitted by the officers of the city. The complaint was demurred to. The demurrer was sustained and the plaintiff appealed.

*Joe Kirby*, for the appellant.

*Charles L. Brockway and D. E. Powers*, for the respondent.

49 **KELLAM, J.** This is an appeal from an order sustaining a demurrer to appellant's complaint, on the ground that it "does not state facts sufficient to constitute a cause of action against the defendant." A preliminary question is presented by the contention of appellant that, under section 4910 of the Compiled Laws, providing that the demurrer shall be disregarded unless it distinctly specify the grounds of objection,

the court should have refused to entertain the demurrer, and, in the language of the statute, should have disregarded it. Appellant contends that even if, generally, that form of demurrer is allowable, as "where the question is a lack of sufficient allegations in the complaint, yet it is not sufficient where it is attempted to take advantage of affirmative facts alleged in the complaint." While we recognize some force and reason in the suggestion, we think the distinction has not generally been observed, and that the contrary rule prevails: *Maxwell's Code Pleading*, 381; *Bayliss on Code Pleading*, 216, 217; *Bliss on Code Pleading*, sec. 416; *Getty v. Hudson River R. R. Co.*, 8 How. Pr. 177; *Henderson v. Johns*, 13 Col. 280; *Greensburgh etc. Co. v. Sidener*, 40 Ind. 424. The facts alleged in the complaint as constituting the plaintiff's cause of action are that the <sup>50</sup> defendant city, through its common council, appointed and continued in office a careless, inefficient, and negligent police force; that at the time of the accident referred to there was in force in said city an ordinance prohibiting the firing of guns and cannon within the limits of said city, but that with full knowledge on the part of the members of the common council of said city that it was to be done, the said police officers of said city permitted a cannon to be placed in one of the public streets of said city, and there carelessly fired after dark, and at a time when it could not be discovered by travelers on said street, and that plaintiff, while passing along said street, was, without any fault or negligence upon her part, struck by the wadding so fired from said cannon, and greatly injured. In a second count of the complaint it is alleged that the said defendant city, through its officers and employees, negligently and carelessly allowed the said street to be obstructed by a nuisance, to wit, a large cannon, which it negligently and carelessly permitted to be exploded upon said public street under the circumstances and in the manner described in the first count, well knowing the dangerous character of said cannon and of such explosion, resulting in the injury to the plaintiff already noticed. And in a third count it is alleged that at the time of said accident the common council of said city had and exercised the power of causing the public streets of said city to be lighted for the purpose of preventing accidents and injury to travelers thereon after dark, but that, by reason of the failure of said defendant city

to have a light in the street in the vicinity of this cannon, the accident and injury occurred, as already described.

It will be observed that the theory of the first count or alleged cause of action is that of actionable negligence in appointing and maintaining in office negligent and inefficient officers, and knowingly permitting the violation of a city ordinance; the theory of the second count is in knowingly allowing the public street to be obstructed by a nuisance; and that of the <sup>51</sup> third, failure of the city to light the street in the vicinity of the accident, it possessing the power to light the streets, and having undertaken to exercise it.

There are two kinds of duties imposed upon a municipal corporation in respect to which there is a clear distinction—one is imposed for governmental purposes, and is discharged in the interest of the public, and the other arises from the grant of some special power, in the exercise of which the municipality acts as a legal individual. In the latter case the power is not held or exercised by the municipality as of because it is one of the political subdivisions of the state, and for public governmental purposes, but as and because it is, as an individual might be, the grantee of such power for private purposes. In such case the municipality is on the same footing with a private grantee of the same power, and is, like him, liable for an injury caused by the improper use of such power. But where the power is conferred upon the municipality as one of the political divisions of the state, and conferred, not for any benefit to result therefrom to such municipality, but as a means in the exercise of the sovereign power for the benefit of the public, the corporation is not answerable for nonfeasance or misfeasance by its public agents: *Maxmilium v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468; *Eastman v. Meredith*, 36 N. H. 284; 72 Am. Dec. 302; *Robinson v. Greenville*, 42 Ohio St. 625; 51 Am. Rep. 857; *Lafayette v. Timberlake*, 88 Ind. 330; *Dillon on Municipal Corporations*, 4th ed., sec. 975. In the enactment of ordinances, and in the appointment of officers and agents for their enforcement, the municipality is exercising a governmental authority, and within its limits acts as the representative of the state, and its officers are regarded as agents, not of the city corporation, but of the state. Their powers and duties are derived from the law, and not from the city under which they hold their appointment. In *Buttrick v. Lowell*, 1 Allen, 172, 79 Am. Dec. 721, Bigelow, C. J., says: "Police officers can in no

sense be regarded as servants or agents of the city. Their duties are of a public nature. Their appointment is devolved upon cities and towns by the legislature as a convenient mode <sup>52</sup> of exercising a function of government, but this does not render the cities and towns liable for their unlawful or negligent acts": See, also, *Maxmilian v. Mayor*, 62 N. Y. 160; 20 Am. Rep. 468; *Norristown v. Fitzpatrick*, 94 Pa. St. 121; 39 Am. Rep. 771; *Hayes v. Oshkosh*, 38 Wis. 314; 14 Am. Rep. 760.

In *Norristown v. Fitzpatrick*, 94 Pa. St. 121, 39 Am. Rep. 771, the action was for injury to a person while lawfully upon the street, by the firing of a cannon, which had been kept up for several hours, and must have been known to the borough officials. A policeman stood by, and made no effort to prevent it. The court held that the officers were not agents of the municipality, so as to render it liable for their negligence, and that the plaintiff could not recover. In *Ball v. Woodbine*, 61 Iowa, 83, 47 Am. Rep. 805, plaintiff, being entirely without fault, was struck in the face and injured by a fire rocket, which, with other fireworks, was being discharged, not only with full knowledge on the part of the council and officers of the town, but with their assistance and encouragement, and in open violation of law. The court sustained a demurrer to the complaint, saying: "We think the facts show no more than a violation of an ordinance of the town, in which violation the officers of the town were active participants." In *Morrison v. City of Lawrence*, 98 Mass. 219, the injury complained of was caused by plaintiff's intestate being struck in the face by a rocket fired by the city marshal, or by a policeman detailed by him, as a part of a display of fireworks ordered by the city council. The court held that the city was not liable. *Robinson v. Greenville*, 42 Ohio St. 625, 51 Am. Rep. 857, presented facts very similar to those before us. The plaintiff was injured by being struck by wadding discharged from a cannon placed in one of the streets of the city, and fired by permission of the city authorities. A complaint setting forth these facts and the non-negligence of the plaintiff, and the carelessness and negligence of the defendant and its officers, was held to state no cause of action against the municipality. In *Schultz v. City of Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, the plaintiff, while carefully passing over a public street in the defendant <sup>53</sup> city, was run against and injured by a coasting sled running furiously

down such street; the said street was constantly used for such dangerous purpose of coasting, with the full knowledge and permission of the authorities and officers of said city. The supreme court reversed the order of the trial court overruling a demurrer to the complaint holding that it did not state a cause of action against the city.

But it can hardly be necessary to multiply authorities. The rule of nonliability of a municipal corporation for the failure or neglect of its officers to properly perform their police duties is too well established to be debatable. It rests largely, at least, upon the principle already noticed, that the officers, in the discharge of such duties, are not the agents of the municipality, but of the state. The implied liability of the municipality for failure to keep its streets in repair has generally, but not always, been recognized; but such implied liability, where it is held to exist, has generally been put upon the theory that such duty is imposed upon the corporation itself, and not upon its officers, as agents of the state: *Dillon on Municipal Corporations*, 4th ed., sec. 1017. *Taylor v. Mayor etc. of Cumberland*, 64 Md. 68, 54 Am. Rep. 759, cited by appellant, may not be entirely in harmony with the conclusions we have announced as drawn from a large number of cases, of which those herein referred to are representative. In the Maryland case the liability of the corporation for an injury inflicted upon a passer-by by a coasting sled was held to depend upon the question of fact whether or not the corporation, through its officers, had made reasonable and diligent effort to enforce the ordinances of the city which were designed to prevent such accidents. The question of liability was discussed as an original one, and not one of the many cases holding nonliability was referred to. We think, however, the views we have expressed are fully sustained by the cases cited, and many more that might be added.

The last count of the complaint was probably intended to charge negligence in not properly lighting the street at the <sup>64</sup> place of the accident. Whether negligence in this respect, with the other facts stated, would constitute a cause of action, we do not now undertake to say. The complaint simply alleges "that by reason of the failure of said city to have a light at or near" the place of the accident, the plaintiff was injured in the manner indicated. There is no allegation of negligence on the part of the city, or facts showing it. The mere fact that there was no light there, even if there

should have been, does not necessarily show negligence. Its absence might be accounted for in many ways entirely consistent with freedom from legal negligence. We think the demurrer to the complaint was properly sustained, and the order of the circuit court is affirmed.

All the judges concurring.

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**MUNICIPAL CORPORATIONS—LIABILITY FOR ACTS OF OFFICERS.**—A municipal corporation has a dual character. It possesses two kinds of powers—one governmental and public; the other private. The former are given and used for public purposes; the latter for private purposes. While in the exercise of the former, the corporation is a municipal government; in the exercise of the latter, it is a corporate legal individual: See monographic note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 377, on liabilities of cities for the negligence and other misconduct of their officers and agents. The corporation has a corresponding liability: Note to *Stevens v. St. Mary's Training School*, 36 Am. St. Rep. 450, 451. A municipality is not answerable for the acts or neglect of its officers or agents intrusted with the discharge of a public or discretionary duty: *Gibson v. City of Huntington*, 38 W. Va. 177; 45 Am. St. Rep. 849. It is not, therefore, liable for the acts or omissions of police officers, who are not agents or servants of the city: Note to *Goddard v. Inhabitants of Harpswell*, 30 Am. St. Rep. 383, 401. Its liability for the negligence of its officers or agents depends upon whether it is exercising governmental duties or powers and privileges conferred for its own benefit: *Moffitt v. Asheville*, 103 N. C. 237; 14 Am. St. Rep. 810. It is not liable for an injury resulting from the firing of a cannon in a public street: Note to *Schultz v. City of Milwaukee*, 35 Am. Rep. 782; or the negligent firing of a skyrocket: Note to *Keller v. City of Corpus Christi*, 32 Am. Rep. 619; or the discharge of fireworks, although the council and officers and a majority of the citizens actively participated, and the town officers made no attempt to stop the discharge, though it was in violation of an ordinance: *Bull v. Town of Woodbine*, 61 Iowa, 83; 47 Am. Rep. 805; *Tindley v. City of Salem*, 137 Mass. 171; 50 Am. Rep. 289.

**PLEADING NEGLIGENCE.**—As a general rule, complaints averring negligence on the part of the defendant must allege the particular acts, the doing of which, or the neglect to do which, constitute defendant's negligence: Note to *Holland v. Barich*, 16 Am. St. Rep. 313.

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## KIRBY v. WESTERN UNION TELEGRAPH COMPANY.

[4 SOUTH DAKOTA, 106.]

**TELEGRAPH COMPANIES—COMMON CARRIER OF MESSAGES.**—Under the laws of South Dakota a telegraph company offering to carry telegraphic messages for the public is a common carrier of such messages.

**TELEGRAPH COMPANIES—REPEAL OF STATUTE—CONSTITUTIONAL LAW.**—A statute making a telegraph company a common carrier of messages is not superseded or repealed by a constitutional provision making it the duty of the legislature to provide reasonable regulations, by general law, for giving effect to the right of a corporation, organized for such purpose, to construct and maintain lines of telegraph within the state.

**INTERPRETATION OF LAWS.**—NEITHER CONSTITUTIONS NOR STATUTES SHOULD BE SO CONSTRUED as to have a retroactive effect, unless such intention is clearly expressed.

**CARRIERS—QUALIFIED LIABILITY.**—A common carrier cannot, by offering to carry under a qualified liability, constitute himself a common carrier with such liability only as he advertises to assume.

**CARRIERS—DUTY, LIABILITY, AND LIMITATION THEREOF.**—A common carrier must accept and carry whatever is offered to him, at a reasonable time and place, and of a kind that he undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless there is a special agreement limiting such liability.

**CARRIERS—CONTRACT LIMITING LIABILITY, HOW PROVED.**—A special contract limiting the liability of a common carrier, except as to the "rate of hire" and "the time, place, and manner of delivery," must be proved by the signature of the shipper or sender.

**CARRIERS—EXACTING AGREEMENT LIMITING LIABILITY.**—A common carrier cannot exact a special agreement limiting his liability as a condition precedent to the discharge of his duty.

**TELEGRAPH COMPANIES—CARRIERS—RESTRICTION UPON LIABILITY.**—A telegraph company cannot legally refuse to accept and transmit an offered message because the person offering it will not assent to stipulations restricting its liability as a common carrier; as where he refuses to sign an agreement that the company shall not be liable for damages in any case if the claim is not presented in writing within sixty days after the message is filed with the company for transmission.

**TELEGRAPH COMPANIES—REFUSAL TO SEND MESSAGE, WHEN COMPLETE.** If a telegraph company refuses to send a message because the person offering it will not assent to stipulations restricting its liability as a common carrier of messages, the refusal is complete, although a few hours afterward such person sends a message substantially like the one refused, and assenting to such stipulations. The sending of the second message is neither a cure nor a waiver of the wrong.

**APPEAL—NONPREJUDICIAL ERROR.**—Error in allowing the jury to separate for a few moments without the usual admonition is not prejudicial if the verdict was plainly right.

ACTION by Joe Kirby against the Western Union Telegraph Company to recover damages for its refusal to send a message. There was a judgment for plaintiff and defendant appealed.

*Bailey & Voorhes, and George H. Fearsons, for the appellant.*

*A. C. Boylan and Joe Kirby, for the respondent.*

<sup>106</sup> **KELLAM, J.** On the fourth day of January, 1892, the respondent offered to the appellant, at its office in the city of Sioux Falls, a written message, confessedly unobjectionable in matter, and requested that it be transmitted in the usual way to the party to whom it was addressed, and then and there offered to pay the usual compensation therefor. The



message was written on ordinary white writing paper. The company declined to send the same unless written upon, or attached to, one of its message blanks. This the respondent refused to do unless the stipulations contained in such message blank should be first erased, so that he would not be bound thereby. Under these circumstances the message was refused by the company. Upon these facts, which appear to be undisputed, respondent brought an action against the appellant company to recover actual damages, and fifty dollars in addition thereto, under section 3910 of the Compiled Laws. The section reads as follows: "Every person whose message is refused or postponed, contrary to the provisions of this chapter, is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto." Upon the trial the respondent proved his actual damages, and had a verdict for twenty-five cents actual, and fifty dollars statutory, damages. Upon this verdict judgment was entered, a new trial refused, and the company appeals.

While other assignments of error, which will be hereafter noticed, were presented and argued, it is evident that the major question is the right of the appellant company to insist upon the message being received and sent subject to the stipulations contained in the message blank, and, if the person offering the message refuse to agree thereto, to decline to receive or transmit the same. If the law sustains the company's right to so insist, or to refuse the message, then, upon the facts in <sup>100</sup> this case, respondent should not have recovered, for it is uncontradicted that the message was refused upon the distinct ground that the respondent positively declined to have it sent subject to the stipulations printed upon the message blank.

By the statute law of this state (Comp. Laws, sec. 3881) "every one who offers to the public to carry persons, property, or messages is a common carrier of whatever he thus offers to carry." That the word "messages," as here used, was intended to include telegraphic messages, is evident from the closely following sections, wherein a "carrier by telegraph" and a "carrier of messages by telegraph" are expressly named, and their duties as such defined. From the adoption of the Civil Code, in 1872, until the legislative session of 1873-74, the state of California had the same statutory provisions, but at the session named the above-quoted section was amended by inserting an express exception of

"telegraphic messages." During the short time such original provision was there in force, we do not find any reported case in which it was considered. Prior to the adoption of such code provision the supreme court of that state had held, in *Parks v. Alta Cal. Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589, that the defendant company, as a general telegraph company, was a common carrier; but the decisions of the courts have been, with great unanimity, against this view, and, under the amended statutes, it is now so held in California: *Hart v. Western Union Tel. Co.*, 66 Cal. 579; 56 Am. Rep. 119. Appellant, however, advances the proposition that these provisions of the old Civil Code, being the sections of the Compiled Laws, above cited, which declare telegraph companies to be common carriers, are superseded and repealed by, because inconsistent with, the constitution. This contention is founded largely upon section 11, article 17, of the constitution: "Any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph in this state, and to connect the same with other lines, and the legislature shall by general laws, of uniform operation, provide reasonable regulations <sup>110</sup> to give effect to this section. No telegraph company shall consolidate with or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph." We think appellant claims too much for this section. It simply declares the right of an association, corporation, or individual to construct and maintain telegraph lines within this state, and to connect them with other lines, and then forbids the consolidation of competing lines. To carry into effect this general right to construct and maintain, and this prohibition against consolidation, the legislature is charged with the duty of providing suitable and reasonable laws and regulations of uniform operation; regulations by and under which the right to construct and maintain may be used and exercised, and the prohibition of consolidation be enforced. We are not convinced that there is any thing in the constitutional section which would forbid the legislature now, if it had never been done before, to impose upon telegraph companies the character and duties of common carriers. But, even if we understand this constitutional section to mean that the legislature should provide reasonable regulations for the conduct of the

current business of telegraph companies, we should not think it had the retroactive effect of repealing former legislation, even though assailed as unreasonable. It is a general rule that neither constitutions nor statutes should be so construed as to have a retroactive effect, unless such intention is clearly expressed: *Cutting v. Taylor*, 3 S. Dak. 11; *Cooley's Constitutional Limitations*, 62, 63; *Sutherland on Statutory Construction*, secs. 463, 464; *Allbyer v. State*, 10 Ohio St. 589; *People v. Gardner*, 59 Barb. 198; *Ex parte Burke*, 59 Cal. 6; 43 Am. Dec. 231. Although peculiar to our state, and the statute itself an exceptional one, I think we must recognize its effect to be to make, in this jurisdiction, a telegraph company "a common carrier of whatever it thus offers to carry," and its duty to receive and transmit respondent's message must be tested by its rights and <sup>111</sup> duties as a common carrier. An individual or corporation becomes a common carrier of just what it offers to carry. Its duty to the public springs from its offer to the public, and must be measured by it; so that the carrier who only offers to carry grain in canvas sacks cannot be required to carry grain in bulk. But while the carrier may thus, in general, determine for himself the character and condition of what he will carry, he cannot, by offering to carry for the public under a qualified liability, constitute himself a common carrier with such a liability only as he advertises to assume. As a common carrier it was appellant's legal duty, if able to do so, to accept and transmit respondent's message, if offered at a reasonable time and place, and if it was of a kind that it undertook or was accustomed to carry: *Comp. Laws*, sec. 3882. The ability of appellant to receive and transmit the message, that it was offered at a reasonable time and place, and that the message itself, except as to the paper on which it was written, was of a kind that it was accustomed to carry, are not disputed.

The dominant question in this case, upon the merits, being whether the stipulations upon the message blank, or any of them, so far restricted appellant's liability as a common carrier as to justify respondent's refusal to consent to them, as a condition of having his message accepted and sent by appellant, we have thought it just to both parties to examine them severally, expressing our opinion upon each, so far as they are involved by the facts in this case. It is not claimed that either of the regulations or stipulations printed upon the message blank, and which respondent was

required to assent to, offended against the rule of impartiality, which appellant, as a common carrier, was bound to observe. Respondent, however, strenuously insists that the stipulation on the printed blank would, if assented to by him, have the effect of relieving the company from a liability imposed upon it by law, as a common carrier, and consequently he ought not to be compelled to agree to it, as a condition of having his message sent.

113 The first matter objected to is as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the original office for comparison. For this, one-half the regular rate is charged, in addition." So much is only explanatory and advisory. Then follows: "It is agreed between the sender of the following message and the company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatd message, beyond the amount received for sending the same; nor for mistakes, or delays in the transmission or delivery, or for nondelivery, of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor, in any case from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages." Then follow the rates for sending insured messages. The order in which the rates, terms, and conditions are stated upon which the company would receive and transmit this message are, of course, not important. The essential thing to know is, did they tally with the duty of the company, as a common carrier. As such common carrier, it must insure, subject to conditions and exceptions herein-after noticed, the correct transmission of the message, for which it was entitled to a just and reasonable compensation. This, by the printed form, it offered to do, and stated the compensation. There is no claim that the compensation named for such service was not just and reasonable, and no such question was raised. The effect of the printed condition is the same as though the rate for an insured message—that is, the compensation for assuming all the duties of a common carrier—had been first stated, and then had followed an offer that for a less compensation it would send the message without incurring the full liability of a common carrier. It left the respondent free to exercise his election as to which offer he would accept, and determine

for himself whether he would pay the company for insuring the correct transmission of the message, as a common <sup>113</sup> carrier, or pay less, and assume a part of the risk himself. A common carrier may have two rates for the transportation of goods—one covering its full common-law liability; the other, a special or limited liability—so long as the shipper has a choice between them, at reasonable rates. He cannot be denied the right to have his goods carried by the carrier under its common-law liability, but, if he desires, and neither statute nor public policy forbid, he may enter into a special contract with the carrier, limiting its common-law liability: *Atchison etc. R. R. Co. v. Dill*, 48 Kan. 210. It is matter of common knowledge that the sending-office marks upon the message-form the rate or compensation paid, and thus is preserved, for the protection of both parties, some evidence at least of the election of the sender and the resulting contract. It was entirely competent for the appellant to limit, by special contract, its obligation as a common carrier: Comp. Laws, sec. 3886. The respondent was not obliged to make such a contract unless he chose. It was a matter of agreement between them. Parties who use telegraph lines are usually economical of their time. In most cases it is important that messages go at once. There is generally little time or opportunity for negotiation. As an expeditious and direct means of bringing both parties to a definite understanding, the company provides and furnishes to the public message-forms containing its proposal of terms. The sender of a message may elect either. One of its offers covers its duty and liability as a common carrier. The sender may pay the tariff fixed for that service, and hold the company to its liability as a common carrier. We are unable to perceive how the offer of the company to qualify its full liability as a common carrier, and accept a less compensation therefor, if the sender so desires, can affect the rights of either. The offer only becomes binding when accepted and signed, and the sender is under no compulsion. He may pay for and get the full liability of a common carrier, or pay <sup>114</sup> less, and get a limited liability. The causes or conditions named in the stipulation as excusing full performance of the company's obligation, and as a common carrier, are "unavoidable interruption in the working of its lines," and "errors in cipher or obscure messages." An "unavoidable interruption" is one that cannot or could not be avoided; and while the courts

have not been strictly at one in their views as to what, in modern times, should be regarded as equivalent to "the act of God or the public enemy" of the old authorities, our statute (sec. 3899) expressly makes "any irresistible superhuman cause" sufficient ground for avoiding the common carrier's liability, and section 3880 definitely fixes the measure of a telegraph company's duty in the transmission of messages to be the exercise of "utmost diligence." We should be unwilling to rule, as a matter of law, particularly in view of the peculiar nature of a telegraphic communication, that the utmost diligence could prevent, or successfully guard against, an "unavoidable interruption in the working of its lines." It may sometimes be a question for the jury whether the facts in a particular case bring it within the rule, but, where the interruption is proved to be broadly unavoidable, we think the company would not be liable. Whether, strictly, as a common carrier, appellant could exact, as a condition of the acceptance and transmission of a cipher or obscurely written message, that the sender should release it from liability for an incorrect sending, we need not now determine, for the refused message was confessedly neither.

It was further provided, as one of the stipulations to which respondent should consent, as a condition of sending his message, that "no responsibility regarding messages attaches to the company until the same are presented and accepted at one of its transmitting offices." This would seem to be quite consistent with the provisions of our statute making the carrier's duty to commence when whatever is to be carried is offered "at a reasonable time and place"; but that, like the stipulation as to cipher and obscurely written messages, is not a question in <sup>115</sup> this case, for it is undisputed that the message was offered at the proper office of the appellant, so that such stipulation could not restrict or affect appellant's liability to respondent in this case.

Another stipulation of the message-blank was that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." Appellant here insists that this condition does not propose, nor is its effect, to limit in any way its responsibility as a common carrier, but is rather in the nature of a reasonable regulation, which appellant has a right to make, and which respondent, without any special

contract on his part, was bound to observe, and cites cases in support of that view, notably that of *Express Co. v. Caldwell*, 21 Wall. 264. That case came before the court on plaintiff's demurrer to defendant's plea averring an express agreement upon the part of the plaintiff shipper that defendant should not be liable for loss or damage unless claim therefor was made within ninety days, and the question presented and decided was whether such an agreement, when made, was binding on the plaintiff. As to the necessity for an agreement in order to so qualify its liability, the court says: "Certainly it ought not to be admitted that a common carrier can be relieved from the full measure of that responsibility which ordinarily attends his occupation, without a clear and express stipulation to that effect obtained by him from his employer"; thus treating the stipulation in question not as a reasonable regulation, which it was competent for the carrier to make, and binding on the shipper without his consent, but as an agreement depending upon the consent of both parties. The court held that such an agreement was not such an attempted restriction of the carrier's responsibilities as would be invalid, but, being reasonable and fully assented to by both parties, it was binding; but that is not equivalent to saying that the carrier could compel the shipper to enter into such a contract, <sup>116</sup> or require it as a condition of accepting his shipment. The very fact that such limitation of liability is the subject of agreement between the parties implies that either party may refuse to make such agreement. However such agreement may be proved elsewhere, our statute provides that here it can only be manifested by the signature of the consignor, etc: Comp. Laws, sec. 3888. In *Hartwell v. Northern etc. Express Co.*, 5 Dak. 463, our territorial supreme court rejected the defense of the carrier that the claim of loss upon which the action was founded was not presented to the company within the time specified in its receipt, upon the distinct ground that under the controlling statute just referred to there was no special contract so providing or binding upon the parties. It was a rule or regulation of the company, and as such was printed in the receipt delivered to the consignor, but the court held that it did not operate to make the liability of the company differ in any respect from what it would otherwise be, because, not being signed by the consignor, it was not a special contract, as required and defined by the statute. Now, if without such special con-

tract, the liability of the carrier is not thus limited, and with it it is, can the carrier refuse the offering of a shipper of "whatever it is accustomed to carry," unless he will so contract to limit the carrier's liability? We think not. The carrier's duty is to receive and carry subject to the full measure of liability, unless restricted by mutual agreement; and except as to "rate of hire, the time, place, and manner of delivery," such an agreement can only be shown by the signature of the shipper or sender. In Tiedeman's Limitation of Police Power, pages 256, 257, the learned author, after recognizing and discussing the right of a common carrier to modify and restrict its liability by special agreement with its patron or employer, says: "But the contract must be freely and voluntarily made. The carrier cannot refuse to take goods for carriage under the common-law liability if the consignor should refuse his assent to a limitation": To the same effect, see *New Jersey Steam Nav. Co. v. Merchants' Bank*, 117 6 How. 344. Nor can a carrier require of a shipper a waiver of any of his rights as a condition precedent to receiving and carrying his freight: *Missouri Pac. R. R. Co. v. Fagan*, 72 Tex. 127; 13 Am. St. Rep. 776. To sustain such a stipulation, when fairly made, is only to concede the right and power of the parties to make it, and comes far short of meaning that the carrier may exact the making of it as a condition precedent to the discharge of his duty as a common carrier. The statute was evidently intended to settle within this jurisdiction the question of how, and to what extent, the general liability of a common carrier may be limited; and, by providing, as it does, that it can only be accomplished by a special agreement, it has deliberately left it with either party to consent, or to refuse to consent, to such an agreement. The right to exercise such freedom of will by the respondent in this case would be denied and destroyed if he were compelled to consent under penalty of having his message refused. It has been suggested that respondent could found no right of action upon refusal of appellant to transmit his message unless he would agree to the stipulation, because, if made under such compulsion, it would not be enforceable against him, and therefore harmless; but such conclusion would be consistent with neither the duty of the appellant nor the right of the respondent. This right and this duty were correlative, and each was a measure of the other. Whatever respondent had a right to have sent, it was



appellant's duty to send. If it was respondent's right to have his message transmitted without agreeing to this condition, it was appellant's duty to transmit it without imposing such condition; and it could not justify a refusal to send on the ground that the stipulation sought to be exacted as a condition precedent might, by proper effort on his part, be avoided by respondent, because made under compulsion, or because void and nugatory (if such statute should be held to apply to such a case), under section 3582 of the Compiled Laws.

Following the line of these views, we are of the opinion <sup>118</sup> that appellant could not, as a common carrier, legally require respondent to enter into the agreement which we have just discussed, and so that it could not legally refuse to receive and transmit his message because he declined to make such agreement. Of course this decision will not be understood as touching the question of the company to make and enforce reasonable general regulations for the convenient and orderly transaction of its business, and for the proper protection of its interests, consistent with its duties as a common carrier. The appellant did not object to respondent's message because it was written on respondent's letter-head, instead of on a message-blank, and so inconvenient for filing or preservation in accordance with the practice of appellant. Respondent offered to use the blank if appellant would erase the contract which he would otherwise be required to assent to in using it. The issue between the parties was distinctly as to the right of appellant to require assent to the stipulations restricting its liability as a common carrier, and this decision covers only that question. Its refusal to receive and transmit respondent's message under the facts proved constituted a refusal, within the meaning of section 3910 of the Compiled Laws. Such refusal gave respondent a cause of action, and his right of action was not destroyed nor affected by the fact that he afterward sent substantially the same message. If to refuse the first message was an actionable wrong to respondent, persistence in it by appellant, to the extent of compelling respondent to submit to it, and to send another message on appellant's terms, did not cure or undo the first wrong. The testimony seems to show that respondent offered and attempted to have his message sent in the afternoon, between 2 and 4 o'clock; that it was refused under the circumstances above recited; that he then wrote a letter to the party to whom he desired to send the message, but,

subsequently, and that evening, about 7 o'clock, feeling doubtful of its reaching the party in time, he went to the office, and sent, upon one of the appellant's blanks, a message of very nearly the tenor of <sup>119</sup> the message previously refused. There was nothing in this to waive the wrong of the refusal, or affect respondent's legal right to complain of it.

Finally, it is assigned as error that during the trial the jury was allowed to separate for a few moments without being admonished by the court, as required by section 5051 of the Compiled Laws, not to converse among themselves or with others upon the subject of the trial. Whether, in any case, this fact alone would constitute reversible error it is not now necessary to determine. The facts were not in dispute, and the law, as we understand it, applied to the conceded facts, plainly required the verdict that the jury rendered. Under such circumstances the appellant could not have been prejudiced. The judgment of the county court is affirmed.

All the judges concurring.

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CONSTITUTIONAL LAW—CONSTRUCTION.—A statute must not be given a retroactive effect unless its language expressly requires it: *People v. O'Brien*, 111 N. Y. 1; 7 Am. St. Rep. 684, and note; and constitutional provisions are construed by the same canons of construction that apply to statutes: *Dunn v. City of Great Falls*, 13 Mont. 58.

CARRIERS, LIMITING LIABILITY.—A common carrier is bound to receive goods tendered him for shipment, subject to his common-law liability, unless the shipper sees fit to limit his liability by contract or agreement: *Wallace v. Matthews*, 39 Ga. 617; 99 Am. Dec. 473, and note. The carrier may, by contract, limit his common-law liability so far as is reasonable, but it is unreasonable to allow him to contract against his own negligence. Such a contract would be against public policy: Note to *Willock v. Pennsylvania R. R. Co.*, 45 Am. St. Rep. 680; *Railway Co. v. Cravens*, 57 Ark. 112; 38 Am. St. Rep. 230. The contract limiting liability need not, however, be in writing, and parol proof of a special agreement between the shipper and the carrier may be introduced: *Roberts v. Riley*, 15 La. Ann. 103; 77 Am. Dec. 183.

TELEGRAPH COMPANIES AS COMMON CARRIERS.—Some of the cases hold that telegraph companies are common carriers; other cases hold that they are not: Note to *Pacific Tel. Co. v. Underwood*, 40 Am. St. Rep. 494. A telegraph company has power to make reasonable regulations for the conduct of its business, and its customers are bound by them after they have knowledge of their existence: Note to *Stamey v. Western Union Tel. Co.*, 44 Am. St. Rep. 99. It may limit its liability, but it cannot contract against the consequences of its own negligence, nor limit a recovery for damages thereby sustained: Note to *Western Union Tel. Co. v. Munford*, 10 Am. St. Rep. 634; *Brown v. Postal Tel. Co.*, 111 N. C. 187; 32 Am. St. Rep. 793, and note. A stipulation by a telegraph company that it will not

be liable unless a claim for damages is presented within sixty days from the time the message is sent has been held in some cases void; in others, reasonable, and that it ought to be enforced: *Pacific Tel. Co. v. Underwood*, 37 Neb. 315; 40 Am. St. Rep. 490, and note.

#### Right of Carrier to Exact Special Contract of Shipper.

Goods are usually shipped under contracts limiting the liability of the carriers, and it is clearly established that a carrier has the right to limit his liability in the shipment of goods: *Georgia R. R. etc. Co. v. Keener*, 93 Ga. 808; 44 Am. St. Rep. 197, and note; note to *Railway Co. v. Cravens*, 38 Am. St. Rep. 241; *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170; 30 Am. St. Rep. 800, and note. But admitting the right thus to restrict his obligation, it by no means follows that he can do so by any act of his own. He is in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. He is bound to receive and carry all the goods offered for transportation within the line of his business, subject to all the responsibilities incident to his employment, and is liable to an action in case of refusal: *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; 62 Am. Dec. 125; *Bennett v. Dutton*, 10 N. H. 481, 488; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243; *McMillan v. Michigan etc. R. R. Co.*, 16 Mich. 79, 111; 93 Am. Dec. 208; *Kansas Pac. Ry. Co. v. Nichols*, 9 Kan. 235; 12 Am. Rep. 494. A common carrier, exercising a public employment, cannot, like a tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuses to receive a passenger or to carry goods according to the course of his particular employment, without a sufficient excuse, he is liable to an action, and he can only demand a reasonable compensation for his services and the hazard which he incurs: *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; 62 Am. Dec. 125; *Bennett v. Dutton*, 10 N. H. 481, 488; *McMillan v. Michigan etc. R. R. Co.*, 16 Mich. 79, 111; 93 Am. Dec. 208; note to *Railway Co. v. Cravens*, 38 Am. St. Rep. 241. While the parties have a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter in no way affecting the public morals, or conflicting with the public interests, the carrier cannot say to the shipper, "I will not carry your goods unless you agree to the terms which I dictate." The shipper may make terms with the carrier if he chooses, but if the shipper refuses to accede to the restrictions imposed by the carrier, the latter must transport the property under his common-law liability: *Moses v. Boston etc. R. R.*, 24 N. H. 71; 55 Am. Dec. 222; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243. The carrier has no right to refuse goods offered for carriage at the proper time and place, on tender of the usual and reasonable compensation, unless the owner will consent to his receiving them under a restricted liability; and the owner can insist on his receiving the goods under all the risks and responsibilities which the law annexes to his employment: *McMillan v. Michigan etc. R. R. Co.*, 16 Mich. 79, 111; 93 Am. Dec. 208; *Michigan Cent. R. R. Co. v. Hale*, 6 Mich. 243; *Moses v. Boston etc. R. R.*, 24 N. H. 71; 55 Am. Dec. 222; *Cole v. Goodwin*, 19 Wend. 251; 32 Am. Dec. 470; *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 382; *Bennett v. Dutton*, 10 N. H. 481, 488; *Dorr v. New Jersey Steam*

*Nan. Co.*, 11 N. Y. 485; 62 Am. Dec. 125. The carrier cannot, as a condition precedent for carrying, exact from the shipper a contract in writing signed by him, and limiting or changing the common-law liability of the carrier: *Atchison etc. R. R. Co. v. Dill*, 48 Kan. 210. It must be observed, however, that if no contract can be made, the shipper must pay the carrier for his risk as insurer, and he must also pay a premium to others for his protection against the same loss for which the carrier stands responsible: *Dorr v. New Jersey Steam Nav. Co.*, 4 Sand. 136, 145. The assent of the shipper to a contract exonerating the carrier from liability is not to be implied or inferred from a general notice by the latter to the public limiting his obligation. Such limitation may or may not be assented to, and the general rule is that the common-law liability of a carrier of goods cannot be limited by a general notice, though brought to the knowledge of the shipper: See monographic note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 720, discussing the question; *Brown v. Adams Express Co.*, 15 W. Va. 812; *Kimball v. Rutland etc. R. R. Co.*, 26 Vt. 247; 62 Am. Dec. 567; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318. If the owner of goods at the time and place of the delivery should say to the carrier, "I have seen your notice, but I decline to send the goods on the terms stated in it, and insist that you shall receive and carry them under the liability which the law imposes upon you in your capacity of a common carrier," the carrier could not refuse to take the goods, and it certainly could not be intended in such a case that there would be any agreement of the parties to control the general rule of law: *Moses v. Boston etc. R. R.*, 24 N. H. 71, 89; 55 Am. Dec. 222; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sand. 136, 144. If any implication is to be indulged from the delivery of the goods under the general notice, it is as strong that the owner intended to insist upon his rights and the duties of the carrier as it is that he assented to their qualification: *Hollister v. Nowlen*, 19 Wend. 234; 32 Am. Dec. 455; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 383; *Dorr v. New Jersey Steam Nav. Co.*, 4 Sand. 136, 144. Nor is the assent of the shipper to the limitations in a receipt or bill of lading necessarily to be presumed from acceptance of the receipt or bill: Note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 722; *Georgia R. R. Co. v. Gann*, 68 Ga. 350; *Western Transit Co. v. Hosking*, 19 Ill. App. 607; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Merchants' Despatch Trans. Co. v. Leyser*, 89 Ill. 43; *Brie etc. Trans. Co. v. Dater*, 91 Ill. 195; 33 Am. Rep. 51; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318; though the fair and honest acceptance of a bill of lading without dissent raises a presumption that all limitations contained therein were brought to the shipper's knowledge and agreed to by him: Note to *Central R. R. Co. v. Hasselkus*, 44 Am. St. Rep. 43. The kind of notice is not material. There is no distinction between notice in newspapers, or by hand-bills, and notice printed on the back of a carrier's receipt or elsewhere. Wherever it may be found it is still but notice: Note to *Kansas City etc. R. R. Co. v. Rodebaugh*, 5 Am. St. Rep. 723. Whether a shipper knows the terms and conditions of a receipt or bill of lading, and assents to the same, is necessarily a question of fact for the jury: *Merchants' Despatch Trans. Co. v. Leyser*, 89 Ill. 43; *Adams Express Co. v. Haynes*, 42 Ill. 89; *Lake Shore etc. Ry. Co. v. Davis*, 16 Ill. App. 425. "The burden of proof lies on the carrier, and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference, founded on doubtful and conflicting

evidence; but should be specific and certain, leaving no room for controversy between the parties": *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 384, per Nelson, J; *Central R. R. v. Dwight Mfg. Co.*, 75 Ga. 609; *Louisville etc. R. R. Co. v. Meyer*, 78 Ala. 597. The liability of common carriers is peculiarly stringent, and they will not be permitted to limit that liability by special contracts, unless they are fairly made, fully understood by the other party, and are clearly proved: *Adams Express Co. v. Nock*, 2 Duvall, 562; 87 Am. Dec. 510.

Again, a common carrier must hold himself in readiness to ship with common-law responsibility, and must offer to shippers a reasonable and *bona fide* alternative between that mode of shipment and the one with limited responsibility: *Railroad v. Gilbert*, 88 Tenn. 430. If the carrier has two rates or charges for carrying—one if carried under the common-law liability, and the other if carried under a special contract—the shipper must have real freedom of choice in making his selection. Hence, a special contract limiting the liability of a carrier, signed by a shipper of horses after they are aboard of a train, upon demand of the carrier's agent, combined with a statement that otherwise the horses will not go on that train, is not binding upon the shipper: *Atchison etc. R. R. Co. v. Dill*, 48 Kan. 210; upon the principle that if the shipper has no choice, under the circumstances, except to ship his property under the terms offered by the carrier, the stipulation of exception from liability must be regarded as unfairly obtained, and therefore as inoperative: *Railway Co. v. Cravens*, 57 Ark. 112; 38 Am. St. Rep. 230. If a common carrier furnishes its agents bills of lading, uniform in terms and containing stipulations limiting its liability for loss to losses occasioned by its negligence, and will not receive property for shipment except under such bills and stipulations, a shipper, though he does not expressly object to such bills, is not deemed to have assented thereto. It is against the policy of the law to permit contracts to be made restricting the carrier's common-law liability where he does not afford shippers an opportunity to contract for the service without restriction: *Railway Co. v. Cravens*, 57 Ark. 112; 38 Am. St. Rep. 230.

"It is a well-known fact," says Hemingway, J., in the case last cited, "that the prosperity of the public collectively, and of its members individually, depends absolutely upon transportation and transportation agencies; and that the carrying business is mostly concentrated in a few powerful corporations, to a large extent controlling monopolies, natural if not legal, whose position enables them to control it. Circumstances, well understood, that exist without any design of the law, give them the power to shape the carrying business, and impose upon it such conditions as they see fit. Every demand they make represents the will of their aggregate being, backed up by all their concentrated powers. The public, in meeting such demands, act separately and not collectively. The individual stands alone, and can oppose, to the demand coming from such concentration of corporate power, the influence of but one member of the vast aggregate that comprises the public. Whether he gives the carrier his patronage or does not matters but little to the latter; but whether the carrier transports his property promptly and safely will perhaps determine whether he succeeds or fails in business. If he declines the terms proposed, and refrains from shipping, he has no adequate redress. If he sues to recover his damage, he is subjected to all the delay and expense incident to such litigation, and at last recovers only what the law regards as his damage, and must himself stand, what would generally be much greater, the loss which the law deems too

remote to estimate as damage. If he withhold his patronage, and attempt by this means to induce the carrier to recede from his terms, he can accomplish nothing; for his business is too small to make his patronage material, and, besides, if his property is to be transported, he must at last deliver it to the exacting carrier; for, from the nature of the business, he can rarely find any other. So that he would only have postponed giving his patronage, and the delay in shipment, that may have been very detrimental to his business, would not be appreciable to the carrier. In considering the relative positions of the parties, Judge Bradley thus states his attitude: 'He is one individual of a million. He cannot afford to higgie or stand out and seek redress in the courts. His business will not admit such a course. He prefers rather to accept any bill of lading or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this or abandon his business': *Railroad Co. v. Lockwood*, 17 Wall. 379."

In view of the public character of the carrier's business, it therefore appears clear that he cannot claim the benefit of a contract exempting him from his common-law liability, unless it is fair, just, and reasonable. Furthermore, in view of what has been said of the necessities of shippers, it has been declared, as a matter of law, that an intending shipper is under such a necessity as to amount to compulsion where the carrier proposes and insists upon a special contract limiting his common-law liability as a condition precedent to receiving and carrying the goods; and that a contract obtained from the shipper under such circumstances is obtained by taking an unfair advantage of his situation, wants, and necessities, and should not be upheld: *Railway Co. v. Cravens*, 57 Ark. 112; 38 Am. St. Rep. 230. So, where the means of transportation are greatly monopolized, a carrier will not be permitted to take advantage of his position to coerce the shipper to agree to a limited value by a threatened charge of a high and unreasonable rate if such agreement is not made. There must be no "imposition, coercion, or undue advantage": Note to *Chicago etc. Ry. Co. v. Chapman*, 23 Am. St. Rep. 596, on the power of a common carrier to limit the amount of his liability, in the event of loss, to a sum less than the injury sustained.

## FISK v. WESTOVER.

[4 SOUTH DAKOTA, 233.]

**SUITORS—EXEMPTION FROM SERVICE OF PROCESS.**—A NONRESIDENT SUITOR coming into this state to attend the trial of his case is privileged from the service of civil process while coming to, attending upon, and returning from the court trying the cause.

ACTION by Fisk against Westover. Plaintiff appealed from a judgment setting aside the service of summons.

*Shunk & Hughes*, for the appellant.

*Horner & Stewart*, for the respondent.

<sup>234</sup> KELLAM, J. This is an appeal from an order of the circuit court setting aside the service of a summons upon

defendant. The affidavit upon which the motion was granted shows that the defendant (respondent) was a resident of the state of Illinois, temporarily in Hughes county, where the service was made, for the purpose, and only for the purpose, of attending the trial of two certain cases then pending in said court, wherein respondent was a party, and testifying therein. That his presence and attendance at said trials as a party were necessary and essential to the safe and proper conduct of the cases and the protection of his interests therein, and that the service was made during the time he was in attendance upon court. The first of said actions was tried on the twenty-sixth and twenty-seventh days of January, 1891, a verdict being returned in favor of respondent on the latter day. That after verdict, and before judgment was entered thereon, and before the departure of any train or other conveyance by which respondent could start for his home, the summons referred to was served upon him. The second case has not been reached for trial.

There seems to be no question about the facts, nor as to what the affidavit shows as to the circumstances under which the service was made, the only question being discussed by counsel being whether the service of a summons under such circumstances should be allowed to stand and give the court jurisdiction over the defendant. Appellant quotes three sections of the Compiled Laws as controlling: "Sec. 2505. In this territory there is no common law in any case where the law is declared by the codes." "Sec. 4808. No statute law or rule is continued in force because it is consistent with the provisions <sup>235</sup> of the code on the same subject; but in all cases provided for by this code all statutes, laws, and rules heretofore in force in this territory, whether consistent or not with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated." And "Sec. 5274. A witness shall not be liable to be sued in a county in which he does not reside by being served with a summons in such county while going, returning, or attending in obedience to a subpoena." If said section 5274 was intended to cover the whole subject of exemption from the service of civil process during and on account of necessary attendance upon court, the correctness of appellant's conclusions could hardly be avoided; but we do not think it was. It only touches the subject of immunity of witnesses. While it reduced the common-law privilege of a witness to a statutory one, it left that

of suitors unregulated: *Salhinger v. Adler*, 2 Rob. (N. Y.) 704. It must have been within the knowledge of the legislature that some privileges of the same character had almost from time immemorial been accorded by the general law to suitors, attorneys, judges, and other officers in actual and necessary attendance upon court; and although the cases have not been in exact harmony as to what circumstances would justify such immunity, the general principle is well established, and has been declared and applied in cases innumerable. Respondent did not base his motion on the ground simply that he was a witness, but that he was a non-resident suitor, whose rights and interests were then being litigated, and were about to be determined by one of the courts of this state, and that it was essential to the due protection of such rights that he be present at the trial. In a few instances, immunity has been denied to a foreign suitor under such circumstances. Prominent among such cases are *Bishop v. Vose*, 27 Conn. 1, and the more recent case of *Baldwin v. Emerson*, 16 R. I. 304; 27 Am. St. Rep. 741. Concerning *Bishop v. Vose*, 27 Conn. 1, the supreme court of Indiana, in *Wilson v. Donaldson*, 117 Ind. 356, 361, 10 Am. St. Rep. 48, says: "The only case cited by the appellant's counsel, which <sup>226</sup> directly opposes the opinion which we accept as the correct one, is that of *Bishop v. Vose*, 27 Conn. 1, and that decision is not supported by authority, nor are any satisfactory reasons assigned for the conclusions of the court." Subsequently the United States circuit court for the district of Connecticut refused to apply the rule of *Bishop v. Vose*, 27 Conn. 1, in a case where a foreign suitor thus served was the defendant. The reasoning of the opinion, however, is as forceful in respect to one party as the other. It says: "The inconvenience to which plaintiffs are subjected by being compelled to sue defendants in the state of which they are citizens is not so great as to justify the allowance of obstructions by means of legal proceedings which will preclude nonresident suitors from giving free and unrestricted attention to their cases when they are on trial. . . . The decision is confined to a nonresident defendant, because the supreme court of Connecticut held, in *Bishop v. Vose*, 27 Conn. 1, that a nonresident plaintiff was not protected while in attendance upon the trial of his case in this state from the service of a new writ by summons: *Wilson Sewing Machine Co. v. Wilson*, 51 Conn. 595. A perusal of



the cases in which the immunity of a suitor in attendance upon court has been declared discloses the fact that no distinction has generally been made between a plaintiff and a defendant. The reasoning of the courts is as applicable to one as to the other, and the rule of privilege has been applied indiscriminately: *Ex parte Hurst*, 1 Wash. C. C. 186; *In re Healey*, 53 Vt. 694; 38 Am. Rep. 713; *Matthews v. Tufts*, 87 N. Y. 568; *First Nat. Bank v. Ames*, 39 Minn. 179; *Henegar v. Spangler*, 29 Ga. 217; *Thompson's case*, 122 Mass. 428; 23 Am. Rep. 370; *Small v. Montgomery*, 23 Fed. Rep. 707; *Mitchell v. Huron Circuit Judge*, 53 Mich. 541; *Palmer v. Rowan*, 21 Neb. 452; 59 Am. Rep. 844; *Christian v. Williams*, 35 Mo. App. 297; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48; *Andrews v. Lembeck*, 46 Ohio St. 38; 15 Am. St. Rep. 547; *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770. The decision of the court below was in accord with the greatly preponderating weight of authority, and it is affirmed.

All the judges concur.

**PROCESS—EXEMPTION OF NONRESIDENT SUITOR FROM SERVICE OF.**—A nonresident suitor in attendance upon the trial of his case in another state is there exempt from the service of civil process in another suit: *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770, and note; note to *Capwell v. Sipe*, 33 Am. St. Rep. 893; *Thornton v. American etc. Co.*, 83 Ga. 288; 20 Am. St. Rep. 320. *Contra, Baisley v. Baisley*, 113 Mo. 544; 35 Am. St. Rep. 726, and note; *Capwell v. Sipe*, 17 R. L. 475; 33 Am. St. Rep. 890; *Cameron v. Roberts*, 87 Wis. 291; 41 Am. St. Rep. 43, and note.

## STATE v. CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

[4 SOUTH DAKOTA, 261.]

**CORPORATIONS—PLEADING EXISTENCE.**—A complaint against a corporation must aver the fact of incorporation, or show that it is an artificial being capable of being sued, notwithstanding a statute making it unnecessary to prove its existence, unless the defendant avers in his answer that the plaintiff is not a corporation.

**ACTION** by the state against the railroad company to restrain a nuisance. A demurrer to the complaint was sustained and the plaintiff appealed.

*Robert Dollard*, attorney general, for the appellant.

*Winsor & Kittredge*, for the respondent.

<sup>262</sup> CORSON, J. This was an action by the state to enjoin the defendant from continuing an alleged nuisance. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and the same was sustained by the court. From the order sustaining the demurrer the plaintiff appeals. The defendant specifies as the particular ground of objection in the brief filed in this court that there is no allegation in the complaint that the defendant is a corporation. The only indication of the character in which the defendant is sued is in the title. The learned counsel for the respondent contend that the defendant is sued by a name indicating that it is not a natural person, but a company of some kind, and that no facts are stated to show that it is an artificial being, capable of being sued.

It is true that by section 2908 of the Compiled Laws it is provided that, "in all civil actions brought by or against a corporation, it shall not be necessary to prove on the trial of the cause the existence of such corporation, unless the defendant shall, in the answer, expressly aver that the plaintiff or defendant is not a corporation." But an allegation that the defendant is a corporation <sup>263</sup> is, we think, still necessary, and the language of the section presupposes that the defendant is sued as a corporation.

In what manner can a court be advised that the defendant is sued as a corporation, unless it is so alleged in the complaint? In the recent case of *People v. Central Pac. Ry. Co.*, 83 Cal. 393 (decided in 1890), the supreme court of that state, in passing upon this question, says: "The defendant is sued by a name indicating that it is not a natural person, but a company of some kind; but there is no averment of the fact of incorporation, or of any fact to show that it is an artificial being, capable of being sued. Nor, if incorporated, is there any averment to show where, or under what law, so that the court may determine where the jurisdiction of its person lies. An averment of defendant's corporate existence is necessary in every count of a complaint against a corporation: *Loup v. California Southern R. R. Co.*, 63 Cal. 97"; *Mechanics, Banking Assn. v. Spring Valley etc. Co.*, 13 How. Pr. 227. Judge Bliss, in his work on Code Pleading, section 258, says: "But a corporation is an artificial personality, not presumed to exist, even; and the phrase may stand for such personality, or for a joint stock company, or for a partnership, or for a

private person, or for nothing at all. The allegation, then, that the plaintiff is a corporation, even if permitted to be made in general terms, would seem to be essential to show its right to bring the suit." And in section 260 he says: "In regard to actions against corporations, the same general rule should prevail." We are of the opinion that the rule laid down by Judge Bliss and the supreme court of California is the safer and better rule, though there are courts holding a contrary rule. In the case of *Adams Express Co. v. Harris*, 120 Ind. 73, 16 Am. St. Rep. 315, decided by the supreme court of Indiana in 1889, that court says: "The name of the defendant (Adams Express Company) imports that it is a corporation, and it was therefore not necessary to specifically aver that it was a corporation." But, with great respect for that court, we cannot agree with its conclusions. As was said <sup>264</sup> in the California case, the name indicates "that it is not a natural person, but a company of some kind," but whether a corporation or an unincorporated association does not appear. We are not aware of any principle of law that will authorize a court to presume that it is a corporation, any more than it would presume that it was an unincorporated association. A similar view as to the necessity of alleging in the complaint that the defendant is a corporation was taken by the supreme court of North Carolina in *Stanly v. Richmond etc. R. R. Co.*, 89 N. C. 331.

The learned attorney general further contends that the defect, if it exists, cannot be reached by a demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. But we are of the opinion that, under the provisions of our code, the objection can only be made under such a demurrer. It cannot be raised under any of the other grounds of demurrer specified in section 4909 of the Compiled Laws. The attorney general cites in support of his contention *Fulton Fire Ins. Co. v. Baldwin*, 37 N. Y. 651, and *Phoenix Bank v. Donnell*, 40 N. Y. 410. These were both cases in which the alleged corporation was the plaintiff. In the latter case two of the judges dissented. Judge Bliss, in commenting on these decisions, in a note to section 258, says: "If evidence of incorporation is necessary, it is a part of the plaintiff's case. He is only bound to prove the facts constituting his cause of action; and, if any such fact is omitted in the pleading, it should be demurrable for that reason." While, under section 2908 of the Compiled Laws, the party is relieved

from proving the fact of incorporation unless it is expressly averred that the plaintiff or defendant is not a corporation, the rule as to pleading the incorporation is not changed, and the omission of this allegation renders the complaint subject to demurrer. We are of the opinion, therefore, that the learned circuit court properly sustained the demurrer of the defendant, and the order sustaining the demurrer is therefore affirmed.

All the judges concur. —

**PLEADING CORPORATE EXISTENCE.**—In an action against a private corporation it is necessary to allege its corporate character. The words "a corporation" following the name of the defendant in the caption of the complaint do not dispense with the necessity of averring corporate existence. The want of this averment may be urged under a general demurrer to the effect that the complaint does not state facts sufficient to constitute a cause of action: *Miller v. Pine Min. Co.*, 2 Idaho, 1206; 35 Am. St. Rep. 289. The note to this case, however, cites many authorities showing that such an averment should not be exacted.

## PLYMOUTH COUNTY BANK v. GILMAN.

[4 SOUTH DAKOTA, 265.]

**AGENCY.**—THE DECLARATIONS OF AN AGENT ARE INADMISSIBLE to bind his principal unless they constitute an agreement he is authorized to make, or relate to and accompany an act done in the course of his agency.

**BANKS AND BANKING—NEGLIGENCE AS TO COLLECTIONS—EVIDENCE.**—Upon an issue as to whether a bank has been guilty of negligence in failing to collect certain notes left with it for collection, the statement of its cashier that the failure to collect was the "fault" and "neglect" of the bank is not admissible, it being a mere expression of opinion. Such evidence is important, and the court, on appeal, cannot say that it was not prejudicial to plaintiff's case.

**APPEAL—ERROR IN ADMISSION OF EVIDENCE—REVERSAL OF JUDGMENT.**—If a wrong ruling is not invited, and the evidence admitted or excluded is material, the judgment will be reversed, unless the appellate tribunal can ascertain from the record, without weighing the facts as adduced by the evidence, that the wrong ruling did not prejudice the substantial rights of the plaintiff.

**APPEAL—LAW OF THE CASE.**—A question once decided on a former appeal, though by the territorial supreme court, becomes the law of the case, and will not be reversed upon a second appeal if the facts are substantially the same.

**APPEAL.—IN APPLYING THE LAW OF THE CASE** the record on a former appeal in the same action may be examined for the purpose of ascertaining what facts and questions were before the court.

ACTION to recover four hundred and twelve dollars on a promissory note. The defendant set up a counterclaim, alleging that at the time he executed the note he gave the plaintiff notes amounting to eleven hundred and fifty dollars, and a mortgage securing them as collateral, with an agreement that the bank should collect them and apply the proceeds upon the note in question; and that by its negligence said notes and mortgage were not collected, and had become worthless. In the trial court there was a judgment for defendant. Upon the former hearing the judgment of the lower court was reversed: See *Plymouth County Bank v. Gilman*, 3 S. Dak. 170; 44 Am. St. Rep. 782. The opinion in this case was upon rehearing, and the court adhered to its former decision.

*Palmer & Rodge*, for the respondent and petitioner for rehearing.

*Winsor & Kittredge*, for the bank.

<sup>266</sup> BENNETT, P. J. This cause was before us at a former term of this court. An opinion was rendered upon the merits, reversing the judgment of the court below, which is reported in 3 S. Dak. 170; 44 Am. St. Rep. 782. Afterward, upon petition, a rehearing <sup>267</sup> was granted. The issue raised in the original cause was whether or not the appellant had been guilty of negligence in failing to collect certain notes left with it by the respondent for that purpose. During the trial of the case the court below permitted a witness to testify to certain declarations made by the cashier of the appellant concerning the failure of the bank to collect the notes, wherein he said "there was no need of worrying, as it was their fault, but they would go right on and collect them," and that it was through their neglect that the notes had not been collected. This testimony was objected to by the appellant, but the objection was overruled, and it was allowed to go to the jury. Upon appeal this court held that the cashier's declaration that the failure to collect was the "fault" and "neglect" of the bank was not competent testimony, and, it having been received by the court below, the case must be reversed and a new trial ordered.

The former opinion in this case indicates that this testimony was objectionable and vicious, because it came from an agent or officer who, by reason of his agency or official po-

sition, was not competent to characterize the acts of the principal to its detriment. The respondent, in his motion for a rehearing, combats the theory of our former opinion upon these grounds: 1. The evidence, if competent to have been given by the principal, was competent to have been given by the agent of the principal. 2. If the objectionable evidence was improperly admitted, the case should not be reversed if there is sufficient evidence competent to sustain the verdict. 3. The objectionable evidence was simply a conclusion of law, and a motion to strike out all prior answers of the witness could not have been sustained without committing error prejudicial to the defendant, Gilman, because much of the testimony of the witness was competent and pertinent.

As to the first proposition, the witness Gilman, in his answer to a question, among other things, stated that the bank cashier told it was "their fault," and "through their neglect," <sup>268</sup> that the Mason notes were not collected. The opinion had determined that this conversation was had during the pendency of the transaction. Such being the case, the respondent contends that the declarations of the agent concerning the acts of the principal which characterized the manner in which he performed the duties of such collector are competent and binding upon the principal. While we may agree with the respondent that an admission made by an agent while acting within the scope of his authority, and within the legitimate province of his delegated power, is by universal rule of evidence admitted as against his principal, yet this admission must directly relate to the subject matter in controversy, or be so intimately connected with it as to constitute a part of the *res gestæ*. The declarations of the agent are inadmissible to bind the principal unless they constitute the agreement he is authorized to make, or relate to and accompany an act done in the course of an agency. The objectionable statements of the bank cashier were neither of these. When the bank took the Mason notes for collection it was no part of their agreement that they should neglect to do so, or that they should be so dilatory in the matter that the security should become worthless. This was the question to be determined by the action then pending. This was the issue then on trial. What the bank did or failed to do in relation to the collection was competent, but the conclusion or opinion of one of its officers as to the result of their acts we

think was inadmissible. That is what we said in our former opinion, and we have no reason to think differently now.

"But," says the respondent, "if the objectionable language cited in the opinion was improperly admitted, the case should not be reversed if there is sufficient competent evidence to sustain the verdict." The theory upon which this proposition is based is, no doubt, that if it was error to admit it as evidence it was not material or prejudicial, because the competent evidence, introduced without objection, would amply sustain the verdict. A violation of the established rules of evidence is always <sup>369</sup> error. It is not, however, always prejudicial; that is, it is not always available for a reversal of the judgment. It may not be prejudicial in legal contemplation for three reasons: 1. Because it may have been invited; 2. It may not be material; 3. It may not exert any influence upon the ultimate decision of the case. This statement outlines a rule which perhaps will go unchallenged, but its application is a question of great difficulty. Some of the courts indicate that it is proper for the appellate court to examine and weigh the evidence, and, if it is found to clearly and decidedly preponderate in favor of the successful party, to treat the ruling admitting or rejecting improper evidence as harmless: See *Holstein v. Adams*, 72 Tex. 485; *Hooker v. Village of Brandon*, 75 Wis. 8; *Roe v. City of Kansas*, 100 Mo. 190; *State v. Severson*, 78 Iowa, 653.

In the case of *Barton v. Kane*, 17 Wis. 38, 84 Am. Dec. 728, the court said: "No doubt merely irrelevant evidence—that which has no tendency to influence a verdict either way—does not vitiate. It must appear that the party objecting was or may have been injuriously affected." The scale may be turned against a party by the exclusion of evidence seemingly of no great weight, yet, because of the conduct, demeanor, and situation of a witness, become really controlling; while, on the other hand, a verdict may be inclined against him by the admission of incompetent evidence apparently uninfluential, but in fact of great influence. Testimony from a living witness causes a very different influence from testimony reduced to writing and appearing from a lifeless page. It is therefore impossible to formulate any general rule that will be satisfactory and free from exceptions, but we think it safe to say that the decided weight of authority warrants the statement, when the wrong ruling is not invited, and the evidence admitted or excluded is material, the error will be

available for the reversal of the judgment, unless the appellate tribunal can ascertain from the record, without being called upon to weigh the facts as adduced <sup>270</sup> by the evidence, that the wrong ruling did not prejudice the substantial rights of the complaining party. In the case under review the evidence printed in the abstract shows that on the question of negligence there was no apparent conflict. The court record introduced upon the trial shows that the note sued on was dated January 18, 1875; that collateral notes were given to secure its payment; that the plaintiff procured a defective judgment upon these collateral notes in October, 1876, which judgment was allowed to stand in its defective form until May, 1881, when a new judgment was obtained, and the property which was held as collateral to the note was sold for only sixty dollars. The evidence shows the value of the property at the time the note was given to have been at least fourteen hundred dollars. These facts alone might, without introduction of the objectionable declarations of the bank cashier, have been sufficient to have warranted the jury in finding a verdict for the defendants as they did. Yet, can we say, when an officer of the bank testifies that the bank has been negligent in the performance of its duty, and that it is responsible for its acts, that the declaration did not tend to arouse a prejudice against it, and produce a verdict against it? We think not, and, so believing, we must adhere to our former opinion.

As to the third proposition of the petitioner for a rehearing, we think he is right and, at the same time, wrong. If the motion to strike out the objectionable evidence had entirely rested upon the motion as found on pages 18 and 19, folio 36, of the abstract, as stated by the respondent, we should be inclined to agree with him; but we find on page 28, folio 54, of the abstract, when the attention of the court below was directed specifically to the objectionable portion of the witnesses' testimony which was desired to be stricken out, the wording of the motion was as follows: "The plaintiff then moved to strike out the evidence of Mr. Gilman in reference to a conversation in March or April, 1875, with the cashier of the bank in regard to the collection of the collaterals," which motion was denied. This was the conversation <sup>271</sup> wherein the cashier had stated that it was through the "neglect" and "fault" of the bank the collateral notes were not collected, and, by the refusal of the court to strike out



the evidence, we have held it was an error prejudicial to the rights of the appellant, which, upon review, is right. We shall therefore adhere to our former order and opinion in this case.

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**BANKS AND BANKING—CASHIER—AGENCY—DECLARATIONS.**—The cashier of a bank is its agent: *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177; 44 Am. St. Rep. 700; *State v. Commercial Bank*, 6 Smedes & M. 218; 45 Am. Dec. 280. His declarations and admissions within the scope of his ordinary duties, though not expressly authorized, are binding on the bank. If they are out of the scope of his authority they do not bind the bank: See monographic note to *Corser v. Paul*, 77 Am. Dec. 763, on implied powers of bank cashiers. The declaration of an agent to the effect that his principal had been negligent with respect to a past transaction is not admissible, because it is a mere expression of his opinion; but the statements of a bank cashier as to the measures pursued by the bank toward the collection of notes left with it are admissible against it: *Plymouth County Bank v. Gilman*, 3 S. Dak. 170; 44 Am. St. Rep. 782.

**APPEAL—EVIDENCE—LAW OF THE CASE.**—Error without prejudice is no ground for a reversal of judgment: *Osborne v. Francis*, 38 W. Va. 312; 45 Am. St. Rep. 859, and note; and when the court can clearly see affirmatively that error has worked no harm to the party appealing it will be disregarded: See case last cited. If the facts presented in two appeals are the same the decision given on the first appeal becomes the law of the case in all its subsequent stages, and will not be reviewed on the second appeal; and the records on a former appeal in the same action may be looked into for the purpose of ascertaining what facts and questions were then before the court: *Plymouth County Bank v. Gilman*, 3 S. Dak. 170; 44 Am. St. Rep. 782, and note.

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## BARDIN v. BARDIN.

[4 SOUTH DAKOTA, 305.]

**MARRIAGE AND DIVORCE—ALIMONY.**—If the answer in an action for divorce by an alleged wife denies the marriage, temporary alimony and expense money will not be allowed until the plaintiff makes out a reasonably plain case as to the existence of the marriage. Its averment and denial in the pleadings do not bind the court, and if a fair presumption of the fact is raised by proofs presented, the court has power to make the allowance. It is not necessary that it be established so conclusively as would be required for the ultimate purpose of the action.

**PRESUMPTION OF DEATH** ARISES from the absence of a person from his domicile without being heard from for seven years.

**APPEAL—MARRIAGE AND DIVORCE—AMOUNT OF ALIMONY.**—In an action for divorce the amount of temporary alimony and expense money *pendente lite* is in the discretion of the court, and will not be reviewed unless that discretion has been abused.

ACTION for divorce by Della Bardin against Lyman D. Bardin. An order was granted allowing alimony *pendente lite* and defendant appealed.

*James Brown*, for the appellant.

*A. L. Hoppaugh and W. A. Porter*, for the respondent.

<sup>307</sup> BENNETT, P. J. This is an appeal from an order granting temporary alimony and expense money *pendente lite* in an action for a divorce, brought by respondent against appellant. The complaint in that action alleges that the parties were married in the city of Albany, New York, on the fourteenth day of July, 1889, and that they have ever since been husband and wife. The defendant, in his answer, denies that he was at that time, or at any other time, legally married to the plaintiff. He admits that a marriage ceremony was performed at the time and place as alleged in the complaint, but avers at that time, and ever <sup>308</sup> since, the plaintiff had another husband living, and that her marriage with such former husband was in force at the time of her alleged marriage with the defendant. To this allegation there is no reply. The issue presented upon the motion and by the appeal relates to the existence of the marital relation. Unless the relation can be shown to exist, the granting of alimony and expense money was wrong, as that is the very foundation upon which such an order can rest. If it were not so, "every man," as Chancellor Zabriskie said in *Vreeland v. Vreeland*, 18 N. J. Eq. 43, "might be made to pay the expense of any woman who claimed him as her husband, and sues for maintenance, and to support her as long as the suit could be spun out." But in a motion of this kind it may be very pertinently asked to what extent the relation must be shown before temporary alimony and expense money *pendente lite* can be granted. Must it be conclusive? Be beyond a doubt? Or is it sufficient for the alleged wife to show that at the time the marriage ceremony was performed she was acting in the bona fide belief that she was competent to enter into the marriage contract, and that the facts and circumstances were such, at that time, as would *prima facie* show a valid marriage? In our judgment the court of appeals of New York has laid down the correct rule on this subject in the case of *Brinkley v. Brinkley*, 50 N. Y. 194, 10 Am. Rep. 460, and it is thus stated by Judge Folger: "In application for temporary alimony, . . . although there may be in the answer a general denial of the existence at any time of the marital relation, the court has the power, from affidavits and other papers presented to it, to pass upon the question for the purposes of the applica-

tion, and it is not bound down to the allegation of the complaint and the denial of the answer, if other papers or proofs are submitted to it; and though the denial of the answer, if standing alone, would bring the case within the rule that, when no marital relation is admitted or proven, there is no right to alimony, yet, if the matters contained in other papers, or shown by legitimate proofs before the court, make out, ~~see~~ in the judgment of the court, a fair presumption of the fact of marriage, it has the power to grant alimony pending the action and expense of the action." This rule was reiterated in *Collins v. Collins*, 71 N. Y. 273, where it was said: "When, in answer to the allegation of marriage, facts are stated showing that the applicant was not competent to contract such marriage, and did not become a wife, such facts should be denied, or explained to the satisfaction of the court"; and again asserted in this opinion "that it was not necessary that the marriage be established as conclusively as it would be required for the ultimate purpose of the action, but the plaintiff must make out a reasonably plain case of the existence of the marital relation, and she would then be furnished with the means of temporary support and of conducting the suit until the truth or falsity of the allegations could be ascertained." Taking the above rule as applicable to the case at bar, what are the facts as shown by the pleadings and the affidavits read upon the hearing of the motion? Here the defendant admits the fact of a marriage ceremony being performed, but alleges that it was invalid, because, as he undertakes to prove, the plaintiff, at the time of her marriage to him, had a husband living. She swears that, while she admits a former marriage, she had reason to believe, and did believe, that her former husband was dead at the time she married the defendant; that she was married on the seventeenth day of February, 1877, to one Lewis Osborn; that she only lived and cohabited with him as husband and wife for the space of six months, when said Osborn absented himself from her, and they ceased to live and cohabit together, and he left, and she lost all trace of him since 1878, and had no knowledge of him or his whereabouts, or that he was living. Nor has she been able to find any person who has seen or known of his whereabouts, or that he was still living; and that she has at various times made diligent search and inquiry to find the said Osborn, and has employed people to make search for him; but all her efforts were unsuccessful, and from the cir-

cumstances she verily believed that said Osborn had <sup>310</sup> been dead for years. Still the defendant produced affidavits showing quite conclusively that the said Osborn was still alive. Yet, does this fact militate against the presumption of the death of Osborn, or the belief of the plaintiff that he was dead, at the time of entering into the marriage contract with the defendant? The facts upon which she predicates her belief are not controverted, namely, that her former husband absented himself from her in the year 1878, and left the place of their former abode; that she, by reason of this absence, lost all trace of him; that she had no knowledge of his whereabouts, or where he was living, and that she had made personal diligent search for him, and also employed other persons to do so, but was unable to hear from him for the space of more than ten years, and verily believed him to be dead. These uncontroverted facts raise a violent presumption of such death, and one upon which the plaintiff could, with some degree of certainty, act. The rule as to the presumption of death is that it arises from the absence of the person from his domicile without being heard from for seven years. For an exhaustive review of the authorities sustaining this presumption, see the opinion of Mr. Justice Harlan, in *Davie v. Briggs*, 97 U. S. 628; and for an elaborate discussion of the principles underlying this presumption see the opinion of Chief Justice Johnson in *Ruloff v. People*, 18 N. Y. 179. It is unnecessary to repeat them here. Here the plaintiff swears that she had reason to believe, and still believes, that her husband was then dead. To adjudge this matter upon *ex parte* affidavits, and that on the issue that the defendant will succeed in the action for divorce, and withhold from the plaintiff the means of resisting the attack, would, to a certain extent, be a prejudgment adverse to her on the merits without lawful evidence, the consequence of which might, and probably would, be that she would be unable to properly prosecute her suit. A good and sufficient action might be prevented, as the plaintiff appears to be penniless, and, unless the court provides her with the means of prosecution, <sup>311</sup> she will be unable to proceed further with her suit.

It is further contended that the allegation contained in the answer that the marriage between Lewis Osborn and plaintiff is yet valid and existing, and is now in force, and that plaintiff knew at the time of her marriage to the defendant

that the marriage between herself and said Lewis Osborn was existing and in force, is a well-pleaded counterclaim, to which the plaintiff was bound to reply; and failure to do so was an admission of the facts alleged. Admit this to be true, yet what are the facts admitted? 1. Her former marriage; and 2. That her former husband is alive. Both of these allegations are not entirely inconsistent with a valid marriage to defendant. In any event, the marriage of plaintiff to defendant does not appear from defendant's answer to be void, but voidable.

Section 2239 of the Compiled Laws provides that a subsequent marriage contracted by any person during the life of a former husband or wife of such person is illegal and void from the beginning, unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage. Then granting there was such former marriage, that plaintiff's former husband is alive, and that no divorce has been granted her, still the marriage under the above statute may be valid. This depends upon the knowledge of the plaintiff of that fact. Her affidavit shows she had no such knowledge, which the rule which we have invoked from New York says may controvert the allegation in the pleading. This affidavit is not overturned by other facts or circumstances which would establish its falsity or untruthfulness, so far as the bona fides of the plaintiff is concerned. Therefore, in either view of the case, from the pleadings and facts as shown by the affidavits, we are of the opinion that the court below did not err in granting the temporary alimony and counsel fees in the case.

The defendant further contends that, if the statute and facts in the case warranted temporary alimony, the allowance <sup>312</sup> made by the court was excessive and unnecessary. Upon this appeal we can only consider the question whether the plaintiff has made out a case which, according to established principles of law, authorized the court to make an order granting temporary alimony and expense money pendente lite. If so, the amount was in the discretion of the court, and, unless that discretion has been abused, it will not be reviewed. In our opinion the amount allowed for maintenance or for counsel fees was not excessive. The order of the court below is in all things affirmed.

**MARRIAGE AND DIVORCE—ALIMONY.**—For the purposes of an application for temporary alimony, etc., the fact of marriage need not be so conclusively established as is required for obtaining permanent alimony. If the plaintiff makes a reasonably plain case of the existence of a marriage, although it is denied by the defendant, she should be furnished with the means of temporary support and of conducting the suit, until the truth or falsity of her allegations can be ascertained by the proof formally taken in the case: *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460. She is also entitled to temporary alimony where the husband files a bill against her admitting a marriage, but alleging it to have been illegal and void, and she denies the facts upon which the supposed illegality is founded: *North v. North*, 1 Barb. Ch. 241; 43 Am. Dec. 778. When the facts undisputed are such as that from them a presumption arises that the parties were married, so that the affirmative rests upon the defendant to repel that presumption, the court has jurisdiction and power to grant temporary alimony and expenses, although marriage in fact is denied, and the opposing papers show facts irreconcilable with the existence thereof, or of matrimonial cohabitation: *Brinkley v. Brinkley*, 50 N. Y. 184; 10 Am. Rep. 460. While a valid marriage is necessary to the grant of permanent alimony, temporary alimony will be awarded as a matter of course upon making out a prima facie case. Upon this question the court will not go into the merits of the case, and try the cause upon conflicting affidavits: See monographic note to *Methwin v. Methwin*, 60 Am. Dec. 669, 674, on alimony. A presumption of the death of a prior husband will be indulged to sustain a second marriage; and where a person, whose husband or wife has been absent for five years, without being known to such person to be living during that time, marries, such marriage is valid, though the other husband or wife be living: Note to *Sneathen v. Sneathen*, 24 Am. St. Rep. 331. The judgment of the court with respect to the allowance or the amount of alimony pendente lite is discretionary, and will not be disturbed on appeal unless there has been a clear and flagrant abuse of discretion: See monographic note to *Methwin v. Methwin*, 60 Am. Dec. 679.

## ENOS v. ST. PAUL FIRE & MARINE INSURANCE CO.

[4 SOUTH DAKOTA, 639.]

**INSURANCE—WAIVER.**—If an insurance company, having knowledge of facts rendering its policy voidable, deliberately claims and exercises a right thereunder, it waives all right to avoid it because of such facts.

**INSURANCE—FORFEITURE—ESTOPPEL.**—If an insurance company, by virtue of a provision in its policy, subjects the assured to an examination under oath as to the facts of the fire, it cannot afterward claim a forfeiture of its rights, under the policy, on the ground that no notice of loss was given or proof of the same furnished.

**INSURANCE—AGENCY—EVIDENCE.**—It is competent and admissible, upon the question as to whether a certain person was an agent of an insurance company, for the assured to show that, on his examination under oath as to the facts of the fire, such person appeared, claiming to represent the company, and apparently did so, and that he subsequently, in response to inquiries about the written statement taken on such examination, wrote the assured a letter, at the head of which he was advertised as "adjuster" of the company.

**INSURANCE—STATEMENT ON EXAMINATION UNDER OATH AS PROOF OF LOSS**

**—ESTOPPEL.**—If an insurance company subjects the assured to an examination under oath as to the facts of the fire, and a person appears, claiming to represent the company, and apparently does so, and evidence upon the question of his agency is subsequently before a jury, it is competent, as the first element of an estoppel against the company, to show that it was mutually understood that the statement made in such examination should be accepted as proof of loss. But, to make a complete estoppel, such evidence would have to be supplemented by other evidence.

**INSURANCE—EXAMINATION UNDER OATH AS PROOF OF LOSS—ESTOPPEL.**

If an insurance company, having subjected the assured to an examination under oath as to the facts of the fire, is informed that a person appeared at such examination, assuming to act as agent of the company, and represented that the statement made on such examination should be accepted as proof of loss, and the insured relied upon such understanding, and was not notified by the company to the contrary, but is encouraged by it to continue in such belief, the company is estopped from afterward refusing to treat such statement as proof of loss.

**NOTICE—AGENCY.**—An agent is presumed to have communicated to his principal matters intimately related to the very business he is conducting.

**INSURANCE—PROOFS OF LOSS—WAIVER.**—An objection to the sufficiency of proofs of loss on a specific ground is a waiver of all other grounds.

**INSURANCE.—FORFEITURES** are not favored, and must, therefore, rest on substantial grounds. Hence, if one ground of defense against the payment of a loss is that the insured fraudulently set the fire which caused it, the refusal of the insured to answer certain questions about a large amount of money of which he claimed to have been robbed at the time of the fire, and which property was not covered by the insurance, does not warrant a forfeiture of the rights of the insured under the policy for failure to make proper proof of loss, especially where his claim is found not to have been fraudulently and materially untrue.

**WITNESSES—INSURANCE—PROVING VALUE OF PROPERTY.**—One having sufficient knowledge of the value of property destroyed by fire to speak with intelligence on the subject is competent to give his opinion as to its value.

**WITNESSES—INFERENCES.**—After a witness has stated facts, he cannot testify as to his inferences. They are for the jury. Hence, it is not error to refuse to allow a witness to state how the talk and appearance of an insured person, upon any occasion, affected others than himself.

**EVIDENCE—SILENCE—PRESUMPTION.**—The silence of a party to an action, charged with a damaging fact brought out in evidence, is not an admission of its truthfulness. It simply creates an unfavorable presumption against him.

**APPEAL—WITNESSES—NONE EXPERTS.**—It is not error to exclude the opinion of a witness as to whether a person acting unnaturally was feigning or not, where no prior acquaintance between such person and the witness was shown.

**WITNESSES.—CROSS-EXAMINATION** extends only to the subjects covered by the direct examination. Hence, after a physician has testified, not as an expert, but simply as to facts obvious to others, it is not error to disallow his cross-examination as an expert.

**TRIAL.**—THE SUBMISSION OF SPECIFIC QUESTIONS to the jury is discretionary with the trial court, and its refusal is not error.

**ACTION** on a policy of insurance. The plaintiff obtained a judgment, and the defendant appealed from an order denying a new trial.

*Kueffner & Fountleroy, and H. H. Keith, for the appellant.*

*Palmer & Rodge, for the respondents.*

**644 KELLAM, J.** This is an action to recover upon a fire insurance policy. The complaint, after stating the usual allegations in such an action, and that the fire which caused the loss occurred on the fourth day of November, 1888, further alleges that at such fire the plaintiff Enos received such injuries as incapacitated him for the space of sixty days thereafter to do or understand simple matters of business, "like giving notice of the loss of his said property to the defendant, or making proof of his loss thereon," but that he gave defendant due notice of such loss, and, on or about January 23, 1889, furnished proofs of the same and of his interest, which proofs were accepted by defendant, who waived all further or other notice or proof. A copy of the policy was attached to the complaint as an exhibit, specific provisions and stipulations in which will be noticed as we progress.

**645** The answer alleged, as an affirmative defense, that, subsequent to the making of the contract of insurance, which in terms covered the property of Enos & Baillett as partners, and insured them against loss, said Baillett sold and transferred his interest, if he had any, to said Enos, contrary to the conditions of the contract, and that, at the time of the loss, Baillett had no interest in the property alleged to have been destroyed. Further, that the said fire was willfully and intentionally set and caused by plaintiff Enos for the purpose of recovering the insurance money. Further, that plaintiffs failed and neglected, without reasonable excuse, to furnish proper or sufficient account or proof of said fire and loss, and that they have never furnished said proofs, or any inventory, as provided in said contract; but that certain pretended proofs and account of the fire subsequently furnished were willfully false, untrue, and fraudulent, the effect of which was, by the terms of the contract or policy, to avoid and make it null. To the answer the plaintiffs replied, but, as the answer was neither to a counterclaim nor required by the court, it was voluntary, and not material. The trial resulted



in a verdict and judgment for plaintiffs, and from such judgment and the order refusing a new trial defendant has brought this appeal.

Of the one hundred and sixty-one assignments of error, quite a number are expressly abandoned by appellant, and as many more are passed without argument. Without noticing each individually, we will endeavor to go over the ground covered by those discussed by counsel for appellant. A few questions are raised involving generally the constituent elements of a cause of action like this, such as what a plaintiff is required to prove to show performance on his part, or an acceptance by the company of some thing other, less, or different as performance, and what kind of evidence is competent for either purpose. There are other questions not so general, but peculiar to this case, springing from the admission or rejection of particular items of testimony.

While the making of the contract of insurance, as evidenced <sup>646</sup> by the policy, is not admitted, but is denied by the answer, no question is made but that it was an existing and binding contract at the time of the loss. The fire occurred November 4, 1888. The policy required that the insured "should forthwith give notice of said loss to the company, and, as soon thereafter as possible, render a particular account of such loss," etc. Appellant claims that these conditions were not complied with, and that, consequently, plaintiffs' rights under the policy were forfeited. We shall pass, for the present at least, all the matters and grounds actually or presumably within the knowledge of defendant, on account of which it is claimed the contract of insurance was avoided and became nugatory up to January 23, 1889. The matters thus passed include the omission of Baillett, as well as of Enos, to make proof of loss. We do it upon this ground: The policy provided that, if required by the company, the assured should submit to an examination, under oath, by any person appointed by the company, presumably, though it is not so expressly stated, as to the circumstances of the fire, and other matters affecting the validity of the claim for indemnity. In defendant's answer it is alleged, and the evidence so shows, that on "the 23d day of January, 1889, the said assured, W. B. Enos, in accordance with the terms of said contract of insurance, was duly required by said defendant to submit to an examination under oath, before a person duly appointed by said de-

fendant," etc. Whether what had been done, or left undone, up to that time was sufficient to annul the contract, and destroy plaintiff's rights under it, is not now material. Even though such facts would have entitled the company to treat the policy as no longer binding upon them, they were not obliged to so treat it, and they plainly did not. The only right they had to require the assured to submit to an examination rested directly upon the contract, and, by the exercise of that right, they elected to treat the contract as still in force. They could not claim and exercise a right by virtue of the contract, and at the same time deny the existence of the contract. When, after knowledge <sup>647</sup> of the breach of any of the conditions of the policy, upon which it might have insisted upon a forfeiture, the company recognized its continued validity by requiring the plaintiff to submit to examination under it, it estopped itself from claiming such forfeiture: *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410; *Cannon v. Home Ins. Co.*, 53 Wis. 585; *Gans v. St. Paul etc. Ins. Co.*, 43 Wis. 108; 28 Am. Rep. 535; *Replogle v. American Ins. Co.*, 132 Ind. 360; *Pennsylvania Fire Ins. Co. v. Kittle*, 39 Mich. 51; *Billings v. German Ins. Co.*, 34 Neb. 502; *Hollis v. State Ins. Co.*, 65 Iowa, 454.

We do not mean to be understood as holding that the company, by exercising its right to require Enos to submit to an examination, thereby waived its right to require proper proofs of loss, but we do hold that by so doing it waived its right to hold the contract forfeited on account of any fact or facts known to it when it deliberately exercised such right of examination. We shall assume, then, that on the said twenty-third day of January, 1889, the policy was in force as against any breach of conditions then known to the defendant company, which would, of course, include failure up to that time to give proper notice and furnish adequate proofs of loss, either by Enos or Baillett. On that day the defendant examined the plaintiff Enos under oath. The examination was reduced to writing and retained by Mr. Perry, assuming to act as defendant's agent. The plaintiff's claim that the defendant at that time, through the adjuster and agent, Perry, accepted this statement as proof of loss, and that the subsequent conduct of the company was such as to reasonably lead the plaintiff to understand that it was being so treated by them. The defendant contests the first proposition of this claim on the ground that it was not shown that

Perry had authority to bind the company by such acceptance, and, further, that the evidence does not show that he undertook to do so. That upon the occasion of, and in the taking of, Enos' statement on the twenty-third day of January, 1889, Perry was representing <sup>648</sup> and acting for the defendant company cannot be seriously questioned. The answer alleges that the examination of that date was one required by the company, and was taken before a person appointed by them. There is no claim that there was more than one examination at that time. It was conducted by Mr. Perry, who was evidently in possession of all the papers and information necessary to prepare him for such examination. Subsequently Perry wrote Enos, on one of the company's letter heads, containing the names of the general officers of the company and "A. W. Perry, Adjuster"; the subject of the letter being this same statement. This letter is addressed to Enos, and acknowledges the receipt of one from him, which, he writes, "is referred to me for reply." Enos testifies that, "to the best of his recollection," his letter, to which Perry's purports to be a reply, was addressed to the company. If, as against all this evidence, which we think was competent, Perry was not in fact the agent of the company, but was perpetrating a fraud on both the plaintiff and defendant, the company was in a position to show it, and should have done so. We think, further, that the evidence sufficiently shows that Perry represented the company in the capacity of an adjuster; at all events, it tends to prove it. Conclusive evidence of his relations to the company, and his exact authority as agent, was peculiarly within the knowledge and under the control of the defendant. It could easily have disproved his assumed authority, if he did not have it. As we said in *Gates v. Chicago etc. Ry. Co.*, 4 S. Dak. 433: "It is a maxim of the law that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted." There are cases holding, some directly and others in effect, that the adjuster of an insurance company has an apparent authority to waive proofs of loss—that he has, as to that department of the business, the power of a general agent. In *Ætna Ins. Co. v. Shryer*, 85 Ind. 362, the court says: "There is much diversity of opinion as to whether an adjuster <sup>649</sup> has authority to waive preliminary proofs. It would seem that the

better reason is with the cases which hold that he has; for a company that sends an agent to ascertain the nature, cause, and extent of the loss, and employs him in that particular line of duty, may well be deemed to have invested him with a general authority in all such matters." In *Little v. Phoenix Ins. Co.*, 123 Mass. 380, 25 Am. Rep. 96, it was said, in speaking of agents authorized to adjust a loss; "as a necessary incident they have power to dispense with those stipulations for the benefit of the company which had reference to the mode of ascertaining the liability and limiting the right of action." In *Phoenix Ins. Co. v. Pickel*, 3 Ind. App. 332, the company's adjuster informed the insured soon after the fire that he would not be required to give notice or furnish proof of loss: The court said: "This was sufficient to excuse the giving of the notice sooner, or even at all." See, also, *Brink v. Merchants' etc. Ins. Co.*, 49 Vt. 442, where it was held that the declarations of the adjusting agent in the course of the discharge of his duty were properly shown in evidence. In other cases, such as *Hollis v. State Ins. Co.*, 65 Iowa, 454, this doctrine of presumed authority as matter of law is not accepted, but it is held that his authority must be proved; the jury then determining whether the acts claimed to constitute a waiver were within such authority.

But, passing as questionable the authority of Perry, as adjuster, to bind the company by his acceptance of informal or defective proof of loss, he was still the agent of the company, and for it was investigating the circumstances of the fire, presumably for the purposes of enabling the company to determine whether or not it would pay the loss, and if, while so acting, he undertook for the company, or deliberately caused the plaintiff Enos to understand, that the statement made on such examination would be considered and treated as proof of loss, and the company, with knowledge of the fact and that Enos was relying on it, did not promptly repudiate the undertaking as unauthorized, and thus disabuse Enos, they could not afterward <sup>550</sup> take advantage of his omission to furnish other proofs, so long as such omission was occasioned by the representations of the agent, Perry, and the nonrepudiation by the company. While Perry, as the adjusting agent of the company, might not have been authorized to accept the statement in place of the proof contemplated by the policy, the company itself might do so, or it might by its conduct estop itself from claiming that it had

done so. With these propositions in mind we will examine the evidence upon this question of fact, both as to its competency and sufficiency.

There is evidence tending to show that when Perry called upon Enos, January 23, 1889, for the purpose of concluding the examination under oath, he having previously been there and commenced it, Enos was unwilling to sign the statement until he had time to examine it; that Mr. Perry objected, saying that "he had been there two or three times to take the proof of loss, and that if he did n't sign the paper that day, he should not accept it as that," and that Enos then signed it. This evidence, although excepted to by defendant, was competent. Perry was there acting, not automatically, but as the intelligent and trusted agent of the company. What he said might not have been binding on the company because he said it, but it might have become binding on them because they did not unsay it when fair dealing required them to do so. All the evidence upon the question of whether Enos might and did reasonably understand from what Perry said, that the statement should take the place of other proof of loss, was left to the jury. If found in the affirmative, the first necessary element of estoppel against the company would be established—valueless, of course, as an estoppel, unless complemented with the other necessary constituents. Perry, as the agent of the company, then took the statement away with him, leaving Enos, as the verdict of the jury necessarily implies, under the belief that the statement was to be accepted as proof of loss. In the July following Enos, hearing nothing further, wrote a letter, directing it, as he testifies <sup>651</sup> according to his best recollection and belief, to the St. Paul Fire & Marine Insurance Company, saying that he understood from their adjuster that the statement made to him on the occasion of his examination was all that was required, but asking if additional proofs were wanted, that blanks be sent him. To this letter he testified he received the following reply:

"C. B. GILBERT, Secretary. W. S. TIMBERLAKE, Treasurer.

"C. H. BIGELOW, President.

"ST. PAUL FIRE & MARINE INSURANCE COMPANY.

"Cash Capital \$500,000.

Cash Assets \$1,684,654.70.

"A. W. PERRY, Adjuster.

"ST. PAUL, MINN., July 24, 1889.

"Mr. W. B. Enos, Garry, D. T.

"DEAR SIR: Your favor of the 22nd inst. is referred to me

for reply. The courts differ as to the effect of such a statement as you made being proper proofs of loss. The company does not think it complete until the questions you decline to answer are answered fully. No blanks are furnished assured to make proofs. Do you think it wise to press your claim further?

Yours truly,

"A. W. PERRY, Adjuster."

To the introduction of this letter defendant objected, because it was not shown that Perry had authority to write it, and that, consequently, it did not bind the company. The objection is not good. It was a reply to a letter written to the company. It purported to come from their general office. It was written by one advertised on their letter heads as the general adjuster of the company. He says the letter from Enos was referred to him for reply. If it had been written to him personally, or even officially, it would not have been referred to him. It evidently was written to the company. Any man receiving such a letter under such circumstances, signed by the regular and advertised adjuster of the company, would understand and accept and act upon it as authoritative, and Enos was justified in doing so. In his letter to the company Enos reminded them of his understanding, received from Perry, that the statement would be received as proof of loss. The answer, though written by Perry, from whom Enos claimed to have gotten such understanding, does not disclaim his responsibility for Enos' so believing, but says: <sup>652</sup> "The company does not think it complete until the questions you declined to answer are answered fully." The statement on examination was made January 23, 1889. Whatever representations Perry made as to the acceptance of the statement in place of other proofs were made after the statement was completed, except the signing by Enos. He knew then, as well as in July following, that Enos had declined to answer certain questions, the same questions to which he refers in his July letter. The refusal to answer could not be subsequently used to qualify the effect of his representations to Enos, for the representations were made after, and with fresh knowledge of, the refusal. Suppose Perry had then and there given Enos a writing saying that the statement so made and signed would be accepted and treated by the company as proof of loss; the case would be no stronger for the plaintiff than the verdict of the jury has left it. They have found in their verdict that such represen-

tation was made. Its effect to bind the company in either case, whether verbal or in writing, would depend: 1. Upon his authority; or 2. If unauthorized, upon whether the company, by its subsequent affirmative or negative acts, was estopped from avoiding the effect of the representations, and this will be further considered presently. The letter itself is entirely consistent with Enos' theory that when the statement was signed by him it was mutually understood that it should take the place of other proof; that Perry knew that it was so understood, and that the statement was to be so treated. This was an important fact, affecting the rights and interests of both the plaintiffs and the company. It was intimately related to the very business the agent was conducting. It was of such a nature that it was the duty of the agent to communicate to his principal, and in such case it will be presumed that he did so: *Mechem on Agency*, sec. 723; *Distilled Spirits*, 11 Wall. 367.

If he did so inform the company, or if in law it will be presumed that he did, then the company from soon after the twenty-third day of January retained the statement, without objection, knowing <sup>653</sup> that it was understood by Enos to be proof of his loss, and that, too, notwithstanding the fact that he had refused to answer certain questions propounded to him by the agent. If the company was chargeable with this knowledge, and for six months and until July 24th retained the statement as proof of loss without objection on any ground, had they then not waived every objection or defect which, if objected to, Enos might have remedied? Section 4178 of the Compiled Laws says: "All defects in . . . preliminary proof . . . which the insured might remedy, and which the insurer omits to specify to him without unnecessary delay, as grounds of objection, are waived." But it may be that the knowledge of Perry, the adjuster, ought not to be imputed to the company. If so, then the company had done nothing or failed to do any thing since the 23d of January waiving its rights to proofs as contemplated by the policy, or excusing plaintiff from making such proofs. Upon the receipt of Enos' letter of July 22d, they were, if never before, fully advised that Enos, pursuant to an understanding claimed by him to have been had with the adjuster, Perry, had been and was relying upon the statement made upon the examination being treated as proof of loss. No objection was made, either as to the arrangement

itself or Perry's authority to make it, or that the statement of proof was too late. The only objection made was that the statement contained unanswered questions. Read in connection with the circumstances in evidence the plain inference from the letter was that the company declined to accept the statement as satisfactory proof of loss, because it did not contain information which they regarded as material. In other words, the objection was not to the form of the proof, but that it was defective in a particular respect. Thus, putting the objection on the specific ground was a waiver of all others. This is a rule of our code (sec. 4178), and is the doctrine of the courts generally: 2 Wood on Insurance, sec. 452; May on Insurance, sec. 468.

It becomes important, then, to notice the questions which <sup>554</sup> Enos declined to answer, with a view of determining whether the matter sought to be elicited was such as the withholding of which would alone entitle the company to hold the proof so materially defective that plaintiff's rights under the policy would be forfeited. The property insured was a stock of hardware and store furniture and fixtures. There was no question but that the loss exceeded the insurance. One ground of defense was that the fire was fraudulently set by plaintiff Enos. There was no question but that the company had the right by the terms of the policy to require the plaintiffs to submit to an examination. Under the circumstances of this case, the company was entitled to use great freedom in searching the plaintiffs, the premises destroyed, and all the circumstances and incidents of the fire which would throw light upon its cause and the extent of the loss, and we are not surprised that their agent, Perry, should have asked the very questions he did ask. The plaintiff claimed that on Sunday evening, when the fire occurred, he was called from the church where he was attending service to the store for the purpose, as he says it was presented to him, of waiting on a customer; that, upon opening the store door, a blanket was thrown over his head, he was seized, stricken down, and tied with ropes by two men unknown to him, and robbed of a large sum of money which he then had on his person. These alleged facts come from the statements of Enos under his examination, concluded on the twenty-third day of January, 1889, which have already frequently been referred to. Enos was not examined as a witness on the trial as to these facts. Upon this examination, as appears



from the statements, Enos says he received this money from one C. W. Cunningham on the train the day before the fire; that he went to the train and met Cunningham, who handed him the money; that it consisted of seven five hundred dollar bills and three one hundred dollar bills; that on the evening of the fire they were in an envelope in a red leather bill-book in his inside vest pocket; that he had previously met Cunningham three times in Minneapolis; that he was in the employ of the <sup>655</sup> person who sent the money, which Enos had previously deposited with him for investment; that he had been making such deposits with this same person at different times since 1880; that the depositary resided in Chicago; and that he met Cunningham at the train in pursuance of a letter from the depositary received three days previously. These facts appear in that part of his examination which was taken a short time prior to January 23d, but resumed and concluded on that day. At the conclusion of the examination of the 23d occur these questions and answers:

"Q. From whom did you receive the three thousand eight hundred dollars you say was taken from you on the night of the fire? A. I decline to answer the question. I can't answer the question until I get permission. Q. Where does the party you received the money from reside; his street and number? A. I can't answer. I don't know. I do not know his street and number. Q. What is his postoffice address? A. Chicago. Q. Have you not informed the adjusters, and also other parties, that he resided in Duluth? A. No; I think not. Not that I remember of now. Deponent further states that he bought drafts from parties on New York and Chicago, and remitted them to this third party for investment."

These are the refusals to answer upon which the defendant company bases its right to hold the policy forfeited. The money so claimed to have been taken and lost was not property covered by the insurance, and the only interest the defendant company could have in Enos' answer, as to the name of the party from whom it came, was the advantage it would give them in following it up by further investigation, with a view of satisfying themselves whether he was telling the truth or not. He stated that the party lived in Chicago; that he did not know his street or number; but he did state that the money was sent by him at different times to this third party

by drafts which he himself bought on New York and Chicago. No effort was made to probe the matter further, and yet here was a clue, as it would seem to us, worth more than the name of the Chicago party without street or number. He was not<sup>656</sup> asked where or when he bought the drafts by which this money was claimed to have been remitted, and we cannot presume that he would have declined to disclose this information if asked. To hold with appellant on this point we must be prepared to say that there could have been no facts or circumstances which would have excused Enos from disclosing the name of the party from whom he received this money. Conceding that the subject of the inquiry was one concerning which he was bound to answer to a reasonable length, the case would have been much stronger if the company, through its agent, had made any attempt to use the information which he did give, and had been frustrated with evasive answers or refusal to answer. In respect to this point, the company bases its right to have the policy held forfeited upon the refusal to answer this one question. We think the ground is not sufficient. Forfeitures should always rest upon very substantial grounds. They are not favored either by our code or at common law: *Comp. Laws*, sec. 3435; *May on Insurance*, sec. 367; *Appleton Ins. Co. v. British American etc. Co.*, 46 Wis. 32; *Insurance Co. v. Norton*, 96 U. S. 242; *Olmstead v. Farmers' etc. Ins. Co.*, 50 Mich. 200.

The question of fact, whether there had been any transfer by Baillett of his interest in the insured property to Enos, was submitted to the jury on the evidence, with an instruction that states the law as appellant claims it to be, and their verdict is accepted as conclusive.

We have thus endeavored to consider and discuss the general questions which go to the company's liability on the contract, as affected and controlled by the facts which the evidence tended to prove, and which, from the verdict, the jury must have found were proved. What we have already said upon these general questions will indicate our judgment upon many of the specific errors assigned, including the most of those predicated upon the instructions to the jury, and render particularization unnecessary. Of the remaining assignments based<sup>657</sup> upon the admission or exclusion of evidence, we shall expressly notice only those which seem to be seriously pressed in argument, though we have endeavored to consider each one in our examination of the case.

On the trial it was sought to prove the value of the property destroyed by J. H. Baillett, one of the plaintiffs. It is insisted by appellant that he did not show himself qualified to give an opinion as to its value. Up to the point where the question of his qualification was raised he had testified that he had been for over a year a partner with Enos and half owner of the stock; that he attended the store and did the clerking; that he was not very familiar with the values of that class of property at that time, except as he knew by the marks; that he knew the cost mark and the selling price; and that he generally examined the bills of goods bought, and knew what they cost. While this evidence may not show a very high degree of qualification, it was not error to allow the witness to state his opinion as to their value. It is not required that an expert witness stand at the head of his class to make his evidence admissible. His preliminary examination must show such knowledge of the subject as will enable him to speak with intelligence. The jury will determine the value of his opinion from the knowledge which he shows himself to possess: 1 *Rice on Evidence*, 334; *Bedell v. Long Island etc. R. R. Co.*, 44 N. Y. 367; 4 Am. Rep. 688; *Continental Ins. Co. v. Horton*, 28 Mich. 173.

Referring to the conduct and appearance of Enos shortly before the fire, Mr. Bland, into whose shop Enos went after he came from the church, was asked, after having testified to Enos' actions and appearance, "whether or not his talk and manner was such as to attract your attention and cause you all to comment upon it after he went out." The exclusion of this question was not error. The witness had already stated how he deported himself on the occasion, and that his manner was unusual. The witness could not know as a fact how it affected ~~ess~~ others, nor that it caused them to make comments. He could only infer the cause of the comments, if any were made, from what he saw and heard. Having fully stated the facts, the inferences were for the jury.

Referring to the fact, as it appeared in evidence, that, when Enos was discovered in the burning store, he was apparently tied with ropes, the same witness, Bland, was asked: "Suppose Mr. Enos had been physically able, was there any thing in the way those ropes were tied and fixed to prevent him from getting up and walking off, if he wanted to?" The witness could not answer this question unless he knew how the ropes were tied, and if he knew he could tell the jury,

and then they would exercise their own judgment as to the effect of such tying. The rule is general that facts come from the witnesses and the inferences from the jury.

Error is also charged by different assignments upon the refusal of the court to allow defendant to show by Mr. Manicum, one of its witnesses, that upon a former trial of this case he had given the same testimony as he had already given upon this as to a conversation with Enos; that Enos was present and heard it, and did not go upon the witnessstand and contradict it. We do not understand the rule of law quite as appellant states it, that "whenever a person is charged with any fact which will militate against his case, and he does not deny it, his silence is an admission." Silence, under such circumstances, undoubtedly does and should raise a presumption against him. We think the effect of such silence is usually characterized as an unfavorable presumption, and not necessarily as an admission of the truthfulness of the charge: See *Smith v. Tosini*, 1 S. Dak. 632; *Baldwin v. Whitcomb*, 71 Mo. 651; *Probert v. McDonald*, 2 S. Dak. 495; 39 Am. St. Rep. 796. The witness had testified to what was said by him to Enos in the conversation, and, if Enos did not deny it, defendant was entitled to whatever unfavorable effect would spring from his silence; but defendant was not entitled to show by the witness what he had testified <sup>to</sup> to, and what Enos had not testified to, on a former trial. Besides, if Manicum had sworn that on the previous trial he testified to the same facts as upon this trial, it would not have strengthened his evidence; and if he had testified that Enos, being present, did not contradict him, it would have added nothing to Enos' silence, which was fully patent to the jury. It would simply inform the jury that what was then occurring had also occurred on the former trial. The evidence, if admitted, would not have changed Enos' attitude toward Manicum's testimony, or its truthfulness, or in any manner increase the unfavorable presumption arising from his failure to contradict it. We think the excluded evidence was both incompetent and immaterial.

J. B. Cornish was a witness for defendant. He testified that on the night of the fire he first saw Enos at the church. After the fire he saw him at the parsonage. "Q. Did you speak to him? A. I don't think I did that night. Q. Did you go into the room that he was in? A. I did. Q. How close did you go to him? A. Right up, so my clothes touched the lounge he was lying on. Q. Now state to the jury

whether you saw any thing unnatural about him. A. Nothing, only about the smoke, and starting up once in a while, making a fuss about the smoke, and groaning and rolling around and grabbing hold of things. Q. Did he say any thing? A. 'Smoke! Smoke!' Q. Did you notice any bruise on him? A. I did not. No, sir. Q. Any scratches or any thing? A. Nothing of the kind. Q. Now, I will ask you whether or not you formed an opinion at that time as to whether he was feigning or not." An objection to this question was sustained, and the ruling is assigned as error. In his argument appellant claims that "this witness, being acquainted with Enos and having known him for a long number of years, had a right to give his opinion to the jury" upon the question asked. Without stopping to discuss what the law might be upon the facts thus assumed by appellant, it is significant that the very ground upon which the evidence is claimed to be admissible ~~is~~ is lacking. It does not appear that the witness ever saw Enos before that night. As a question of law this question must be determined upon the facts in the record. If, without any previous knowledge of the manner of temperament or deportment of Enos, his conduct on that occasion was so marked and peculiar as to impress the witness that he was feigning, he could have told the jury some thing of what he said or did to create or justify such opinion. Opinion evidence, particularly from non-experts, is admitted only from necessity, and where the facts and conditions upon which the opinion is based cannot be adequately described to the jury. It is not possible to lay down a rule so exact in terms as to plainly control all cases. Recognizing this difficulty, courts are inclined to determine each question as it arises by the application of general principles to the particular inquiry. It is true that witnesses have often been allowed to express an opinion as to whether a person was "drunk" or not, but this is upon the ground that drunkenness is unfortunately so common that every person is supposed to be familiar with its symptoms. A witness who confessedly had never seen a drunken man ought not to be allowed to express such an opinion. We are not prepared to say that in this case a foundation could not have been laid that would have entitled this witness to express his opinion as to whether Enos was feigning or not; but without having shown any previous acquaintance with him—there being, as the witness says, nothing "unnatural about

him," unless what he undertook without hesitation to describe to the jury was such—we do not think there was error in refusing to receive his opinion.

Dr. Hyde was examined as a witness for the plaintiff in rebuttal of the defense made by the defendant. Upon his cross-examination he was asked: "Did Mr. Enos, in your opinion, have concussion of the brain that night?" The question was objected to as incompetent, irrelevant, and immaterial, and not proper cross-examination, plaintiff's counsel remarking: "I have not gone into the expert branch of this case." The objection ~~was~~ was sustained, and the defendant excepted. It was evidently the understanding of the court, as indicated by plaintiff's counsel, that this witness was not introduced or used as a medical expert, but that he testified to what he saw and did the night of the fire as to facts within his knowledge. At the opening of his examination he was interrogated as follows:

"Q. State to the jury, Dr. Hyde, or describe to the jury, Mr. Enos' appearance when you first saw him at the depot." It may be stated here, parenthetically, that on the night of the fire Enos was taken from the burning building to the depot. The witness' answer was: "After I arrived at the depot Mr. Enos was apparently in an unconscious condition. Now you wish me to give the medical part? Q. Now, sir, I want you to describe the condition just as you saw him; I mean without the medical part."

The witness then testified at considerable length as to what Enos said and did, and how he appeared, and what was done by witness and others. He was not asked nor did he state his opinion as to the probable cause of any symptom or appearance to which he testified, nor did he give any theory as to the nature, extent, or effect of the bruises and scratches which he said he found on his person. He gave no diagnostic description of his condition. He stated such facts only as to his appearance and physical condition as might have been observed and testified to by a nonprofessional witness. Under such conditions the defendant was not entitled of right to ask the witness, on cross-examination, whether in his opinion Enos had concussion of the brain that night, and the court committed no error in disallowing it. Upon the same theory we overrule other assignments of the same nature, based upon the exclusion of other similar questions to the same witness.

It is further assigned as error that the court declined to direct the jury to return answers to two specific questions suggested by the defendant. In *National Refining Co. v. Miller*, 1 S. Dak. 548, we held that the submission of specific questions to the jury was, under section 5061 of the Compiled Laws, discretionary <sup>and</sup> with the court. There was no error, therefore, in such refusal. What we have said upon the different features of this case covers also appellant's objections to the instructions of the court so far as they seem to us important.

While there are a number of close questions in this case, we discover nothing in the record which requires a reversal. The judgment of the trial court is affirmed.

All the judges concur.

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**INSURANCE—FORFEITURE—ESTOPPEL—WAIVER—PROOFS OF LOSS.**—The waiver of a condition in a policy of insurance in favor of the company may be inferred from the acts of the insurer evidencing a recognition of liability after the condition is broken. The forfeiture of a policy for a default of the assured is waived by recognizing the continued validity of the policy. Any course of action on the part of the insured which leads the insured honestly to believe that, by conforming thereto, the forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting upon a forfeiture, though it might be claimed under the express letter of the contract: *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637, and note; *Murray v. Home Benefit Life Assn.*, 90 Cal. 402; 25 Am. St. Rep. 133, and note; monographic note to *Wheaton v. North British etc. Ins. Co.*, 9 Am. St. Rep. 237, discussing the waiver of forfeiture by requiring further proofs of loss. Forfeitures are not favored, and courts are reluctant to declare and enforce them if by any reasonable interpretation it can be avoided: Note to *Schaeffer v. Farmers' Mut. Fire Ins. Co.*, 45 Am. St. Rep. 370. Slight evidence will raise a waiver against an insurance company when the equities are in favor of the assured; and, in construing policies and conditions therein, courts lean favorably to the assured: Note to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 247. Mere silence as to objections to proofs of loss may so mislead the insured, to his disadvantage, as to be of itself sufficient evidence of waiver by estoppel: *Welsh v. London etc. Corp.*, 151 Pa. St. 607; 31 Am. St. Rep. 786, and note. Unless there is a waiver, proofs of loss must be furnished by the assured within a reasonable time or within the time stipulated in the policy: Note to *Gould v. Duelling House Ins. Co.*, 19 Am. St. Rep. 722. Objections to preliminary proofs of loss are waived if the insurance company withholds or fails to disclose such objections beyond a reasonable time after such proofs are furnished, or if its refusal to recognize the obligation to pay is placed by it upon other and distinct grounds than alleged defects in the preliminary proofs: *Firemen's Ins. Co. v. Floss*, 67 Md. 403; 1 Am. St. Rep. 398, and note; *Central City Ins. Co. v. Oates*, 86 Ala. 558; 11 Am. St. Rep. 67, and note. An objection to proofs of loss upon one specific ground, and silence as to another in which was the real defect, operates as a waiver of the latter: *Ayres v. Hartford Fire Ins. Co.*, 17 Iowa, 176; 85 Am. Dec. 553.

**INSURANCE—DECLARATIONS BY AGENT, WHEN BINDING.**—Declarations made by a special agent and adjuster of losses for an insurance company, directly in connection with the business he is authorized to transact, and, to all appearances, fairly within the scope of his agency, are binding upon the company: *California Ins. Co. v. Gracey*, 15 Col. 70; 22 Am. St. Rep. 376, and note.

**WITNESSES—OPINIONS—CROSS-EXAMINATION.**—A witness who is shown to possess peculiar personal knowledge about the matter under consideration, which ordinary persons do not possess, may give his opinions in reference thereto: *Note to Fremont etc. R. R. Co. v. Marley*, 13 Am. St. Rep. 438. Any witness may testify as to facts of which he has means of knowledge, though his testimony may to some extent be an opinion, or involve an estimate: *Baldwin v. Parker*, 99 Mass. 79; 96 Am. Dec. 697. A witness shown to be familiar with property and competent to speak upon the subject may give his opinion as to its value: *Note to Commonwealth v. Sturtevant*, 19 Am. Rep. 411. But ordinarily the mere conclusion or supposition of a witness is not evidence against another person: *People v. Sharp*, 107 N. Y. 427; 1 Am. St. Rep. 851. If an individual is charged with an offense, and he remains silent, when it would be proper for him to speak, such silence, while some evidence, is merely presumptive evidence of guilt: *Kelley v. People*, 55 N. Y. 565; 14 Am. Rep. 342. The cross-examination of a witness should not include new matter: *Mitchell v. Welch*, 17 Pa. St. 339; 55 Am. Dec. 557.



**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**WISCONSIN.**

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**LORD v. AMERICAN MUTUAL ACCIDENT ASSN.**

[89 WISCONSIN, 19.]

**A RELEASE OR ACQUITTANCE SIGNED WITHOUT KNOWLEDGE OF ITS CONTENTS** and without any intention to execute such an instrument is inoperative.

**PAROL EVIDENCE IS ADMISSIBLE FOR THE PURPOSE OF PROVING THAT A RELEASE WAS SIGNED WITHOUT KNOWLEDGE** of its contents, and without any intention on the part of the signer to execute an instrument of that character.

**INSURANCE AGAINST ACCIDENT.—WHETHER THERE HAS BEEN AN ENTIRE LOSS OF A HAND** within the meaning of a policy of insurance when three fingers have been wholly and another partly torn off, the hand cut, and the thumb joint destroyed, is a question for the jury. If the hand was so injured as to become useless as a hand, the insurer is answerable for its loss.

**ACTION** against the defendant, a mutual accident association, by one of its members. As such he was entitled to recover seven and a half dollars a week, not exceeding twenty-six consecutive weeks, for any injury resulting in the loss of one or both hands or feet, causing an immediate; continuous, and total disability. At the trial it was claimed that the defendant had effected a settlement with the plaintiff, and obtained a written release. Such release was sought to be avoided by the plaintiff on the ground that he signed it without knowledge of its contents and without any intention to discharge the defendant from liability. The jury found all the questions submitted to them in favor of the plaintiff. The defendant appealed.

*M. C. Phillips*, for the appellant.

*W. H. Stafford*, for the respondent.

<sup>21</sup> CASSODAY, J. After the plaintiff had notified the defendant of his injury, and in September, 1891, the defendant's soliciting agent called upon the plaintiff, and the plaintiff asked him to get him some money. Such agent thereupon reported such request, together with the facts in regard to the plaintiff's condition, and that he was in serious need of <sup>22</sup> money, to the defendant, and thereupon the defendant sent to the plaintiff the fifty dollars mentioned. The affidavit or proofs of loss made by the plaintiff January 18, 1892, and mentioned in the foregoing statement, constitute what is called the "defendant's Exhibit 4" in the ninth and tenth findings of the jury. It is there found by the jury, in effect, that the plaintiff executed the same without a knowledge of its contents, and that in doing so, or in the alleged settlement, he made a gross error. Such proof of loss consisted of a blank furnished by the defendant and filled out by one of the plaintiff's employers, and the plaintiff signed the same by his mark. There is testimony to the effect that the plaintiff could neither read nor write the English language; that he signed such proofs of loss without knowing that they contained a statement to the effect that the payment of seven dollars and fifty cents a week for twenty-six weeks should be a full discharge of all claim on account of such injury; and that upon receiving the one hundred and forty-five dollars he expressly refused to sign a receipt in full. The admission of such parol testimony is assigned as error; but such admission, under such circumstances, has repeatedly been sanctioned by adjudications of this court: *Schultz v. Chicago etc. Ry. Co.*, 44 Wis. 638; *Bussian v. Milwaukee etc. Ry. Co.*, 56 Wis. 326; *Leslie v. Keepers*, 68 Wis. 123; *Lusted v. Chicago etc. Ry. Co.*, 71 Wis. 391; *Sheanon v. Pacific Mut. etc. Ins. Co.*, 83 Wis. 507; *Whitmore v. Hay*, 85 Wis. 251; 39 Am. St. Rep. 838. These cases hold, in effect, that one who signs a discharge or acquittance without knowing the contents or intending to sign such an instrument, is not bound by it. Here, such discharge or acquittance was not properly any part of the proofs of injury and loss, but an attempt to limit the amount of the claim and bar any further recovery. Had the question of such discharge been squarely presented to the plaintiff, it may be inferred from the testi-

mony that he would have refused to sign it, as he did the receipt in full a day or so afterward.

<sup>23</sup> But the more serious question is whether the tearing off of three fingers wholly, and a part of the other, and cutting the hand, and destroying the joint of the thumb, as mentioned in the proofs, was the loss of one hand, "causing immediate, continuous, and total disability" of the same, within the meaning of the contract of insurance. After careful consideration we are constrained to hold that it was a question of fact for the jury; and the jury have found that such loss of the hand was entire. On the part of the defendant it is contended that there is no such thing as the loss of the hand unless the injury is such as to require the amputation of the hand above the wrist. That would be too much of a refinement upon language for practical purposes. The hand was for use; and, if it was injured so as to become useless as a hand, then the defendant became liable for its loss under the contract. This was held, in principle, in *Sheanon v. Pacific Mut. etc. Ins. Co.*, 77 Wis. 618; 20 Am. St. Rep. 151; 83 Wis. 510.

The charge appears to be full and fair throughout. In fact, there are no specific exceptions calling for a review of any particular portion of it: *Luedtke v. Jeffery*, 89 Wis. 136.

By the COURT. The judgment of the circuit court is affirmed.

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**RELEASE SIGNED WITHOUT KNOWLEDGE OF CONTENTS.**—If a plea of release is set up in an answer alleging an agreement in the nature of a discharge of a cause of action to recover for personal injury caused by negligence, a reply to such plea, alleging that such agreement was obtained by fraud while plaintiff was unable, from pain and suffering, to comprehend his act in signing it, and that he never assented thereto, is good and sufficient in an action at law, and a resort to equity to cancel the instrument is unnecessary: *Girard v. St. Louis etc. Wheel Co.*, 123 Mo. 353; 45 Am. St. Rep. 556, and note. One who has signed a written instrument, such as a release, without being induced to do so by fraud or deception, cannot avoid its effect on the ground that at the time he signed the paper he was ignorant of its contents: *Albrecht v. Milwaukee etc. Ry. Co.*, 87 Wis. 105; 41 Am. St. Rep. 30, and note. See, also, the note to *Bliss v. New York etc. R. R. Co.*, 39 Am. St. Rep. 503.

**PANEL EVIDENCE** is not admissible to show that a party to a contract did not understand its obligations: *Gist v. Drakely*, 2 Gill, 330; 41 Am. Dec. 428.

**INSURANCE—ACCIDENT.**—In *Sheanon v. Pacific Mut. etc. Ins. Co.*, 77 Wis. 618, 20 Am. St. Rep. 151, it was held that by the total loss of limbs was meant the loss of their use as members of the body, so that they will perform no function whatever. Their severance from the body was held not necessary.

## PEPPERCOEN v. CITY OF BLACK RIVER FALLS.

[29 WISCONSIN, 88.]

**PARENT AND CHILD—CHILD CANNOT RECOVER FOR LOSS OF TIME.**—A minor suffering physical injury from the negligence of another cannot recover compensation for loss of time during his inability to labor, nor for money voluntarily paid by his relatives for medicines or medical attendance, unless he has been emancipated and thereby become entitled to the proceeds of his own labor.

**JURY TRIAL—RECEIVING EVIDENCE OUT OF COURT.**—If certain jurors, during the progress of a trial, visited and examined the place of an accident for the purpose of ascertaining the condition of a walk, through defects in which the plaintiff claims to have received injuries, a new trial must be granted. They have no right to base their finding on evidence not adduced in court nor upon a view not authorized by the court.

**JURY TRIAL—THE AFFIDAVIT OF A JUROR MAY BE RECEIVED TO IMPEACH HIS VERDICT** by proving that during the trial he visited the place of the alleged accident for the purpose of ascertaining the condition of a walk from which it was claimed the injury to the plaintiff resulted.

**ACTION** to recover compensation for injuries to plaintiff, a minor, by reason of a defective sidewalk. Verdict and judgment for the plaintiff.

*G. M. Popham and O'Neill & Marsh*, for the plaintiff.

*P. J. Castle and G. M. Perry*, for the defendant.

40 **CASSODAY, J.** The trial court committed no error in refusing to allow the plaintiff compensation for loss of time during her minority from inability to labor by reason of the injury. It does not appear that she was emancipated, and, of course, her services during that time belonged to her father, and not to her. Nor did the court commit any error in refusing to allow her to recover for moneys paid out or incurred by her brother in her behalf for medical attendance and medicines in consequence of such injury. It may be that the physician so in attendance and the person so furnishing the medicines, respectively, might have recovered therefor as for necessities, but those things gave her no right of action for moneys voluntarily paid and liabilities voluntarily incurred by her brother or her father: 41 *Taylor v. Hill*, 88 Wis. 105. The result is, that the plaintiff can take nothing by her appeal; and, in so far as the judgment is in favor of the defendant in disallowing those two items, the same is affirmed.

It is undisputed that during the trial certain of the jury-

men in the case, without any view having been authorized and without the knowledge of those representing the defendant, examined the place of the accident for the purpose of ascertaining the condition of the walk. Whether such examination was influential in securing a verdict in favor of the plaintiff it is impossible to tell. We cannot say that it did not have that effect. Since it may have had that effect, we must assume that it did have that effect. The rule in such cases is well stated by an able text-writer, as follows: "Jurors must base their findings upon evidence adduced in their hearing in court, or upon a view authorized by the court. For a juror to go out of court of his own motion, and make an inspection of the premises or thing in dispute, will be good ground of setting aside the verdict; though, if the party entitled to complain have knowledge of the irregularity, and remain silent, it will be deemed waived": Thompson on Trials, secs. 904, 2605. Here there is no pretense of any such waiver: *Woodbury v. Anoka*, 52 Minn. 329.

It is contended that the affidavits of the jurors as to such misconduct were incompetent. But the rule of public policy which excludes the testimony of jurors to impeach their verdict extends only to matters taking place during their retirement: Thompson on Trials, sec. 2619. This question was recently considered by this court in *McBean v. State*, 83 Wis. 206. We have no doubt that the affidavits of the jurors in the case at bar were competent.

By the COURT. So much of the judgment as is against the defendant is reversed, and the cause is remanded for a new trial.

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**INFANTS—RECOVERY OF DAMAGES BY, FOR NEGLIGENT INJURY TO.**—For a personal injury to a child nine years of age the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by the facts and circumstances of the particular case. Amongst the results of the injury to be considered are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary avocations of life at and after the attainment of majority: *Western etc. R. R. Co. v. Young*, 81 Ga. 397; 12 Am. St. Rep. 320. In an action for damages for personal injuries to a minor, brought for his benefit by a next friend, the damages which diminish his capacity to earn a living must be limited to the period after his majority, for until that period is reached he is not entitled to the proceeds of his own labor: *Houston etc. Ry. Co. v. Booser*, 70 Tex. 530; 8 Am. St. Rep. 615.

**TRIAL—IMPEACHING VERDICT BY AFFIDAVIT OF JUROR.**—No affidavit, deposition, or other sworn statement of a juror, can be received to impeach

a verdict or show on what ground it was rendered: *Weatherford v. State*, 31 Tex. Crim. Rep. 530; 37 Am. St. Rep. 828, and note. But see *Smith v. State*, 59 Ark. 132; 43 Am. St. Rep. 20, and note; and also the extended note to *Crawford v. State*, 24 Am. Dec. 475.

## GOTZIAN v. SHAKMAN.

[39 WISCONSIN, 52.]

**MARSHALING SECURITIES.—IF ONE CREDITOR CAN RESORT TO TWO FUNDS** and another to one only, the latter can compel the former to resort to the fund which the latter cannot touch unless they have not the same creditor, or the two funds are not the property of the same person.

**PARTNERSHIP FUNDS AND PROPERTY, WHAT ARE.—**If under an agreement of partnership one of the parties is to advance certain necessary capital, but, instead of doing so directly, he gives a bond and mortgage to a third person to obtain credit for goods purchased for the firm business, such bond and mortgage become, in legal effect, part of the capital of the partnership.

**MARSHALING SECURITIES.—IF THERE ARE TWO CREDITORS OF A PARTNERSHIP**, one of whom has the security of a bond and mortgage given by one only of the partners, but under such circumstances that his giving them may be regarded as part of his contribution to the firm capital which he had agreed to make, the creditor so secured may be compelled to exhaust such security before resorting to the other property of the firm.

**MARSHALING SECURITIES.—THE FACT THAT A CREDITOR HAVING TWO SECURITIES MUST SUFFER SOME DELAY** if compelled to exhaust one of them before resorting to another does not constitute a sufficient cause for the refusal of the application of another creditor, having but one security, to compel a resort to the security in which he has no interest.

SUIT in equity by the plaintiffs as attaching creditors of a partnership, consisting of Sommermeyer, Brimi, and Huebner, to compel the defendant, Shakman, to resort to and exhaust certain securities held by him before selling under attachment the property of the firm. Sommermeyer, prior to the organization of the firm, agreed that he would contribute to it the capital required over and above four thousand dollars furnished by the other partners. As a mode of doing this he executed his bond in favor of the defendant, Shakman, in the sum of ten thousand dollars, secured by mortgages on real property situate partly in Wisconsin and partly in Minnesota and South Dakota, to secure Shakman for selling goods to the firm. It, in the transaction of its business, became indebted to sundry persons, including plaintiffs and the defendant, Shakman, and the latter secured the first attachment. The object of this suit was to compel him to

exhaust his securities received from Sommermeyer before enforcing his attachment against the firm assets. The defendant filed a demurrer, which was sustained by the trial court, and the plaintiffs thereupon appealed.

*George C. & Fred A. Teall*, for the appellants.

*Miller, Noyes & Miller*, for the respondent.

57 WINSLOW, J. This is an action by creditors who have attached the entire stock in trade of a trading firm to compel another creditor, who has a prior attachment on the same property, to exhaust certain mortgage securities given to him by one member of the firm before resorting to the fund in court arising from the sale of the attached property. In support of the complaint the plaintiffs rely upon the familiar equitable principle that if one creditor can resort to two funds, and another to one of them only, the former must first seek satisfaction out of that fund which the latter cannot touch. Conceding the existence of this principle, the defendant contends—and doubtless correctly, as a general proposition—that it only applies where the two creditors have the same debtor and the two funds are the property of the same person: 1 Story's Equity Jurisprudence, 13th ed., sec. 643; *Ex parte Kendall*, 17 Ves. 520. Were this an ordinary case of one creditor of a firm seeking to compel another creditor to exhaust securities given him by one partner on his individual property, we should have no difficulty in sustaining the demurrer. There are, however, allegations in the complaint which introduce additional equitable considerations, not present in the cases in which the rule has been applied, and which must be considered.

It is alleged in the complaint that, by the contract of partnership, Sommermeyer agreed with his partners to advance and furnish all the necessary capital to be used in the business, except the sum of four thousand dollars, which his copartners furnished, and that in pursuance of this agreement, and in lieu of capital or money, he gave to Shakman the bond and mortgages, in order to obtain credit for goods to be purchased for the firm business. Now, if such was the agreement, it is difficult to see why the bond and mortgages, when given, did not become, in legal effect, a part of the capital of the firm. Had Sommermeyer sold the lands, or mortgaged them to a third person, and placed the proceeds

to the credit of the firm account in bank, they would undeniably have become a part of the capital or assets of the firm. The funds so realized manifestly could not thereafter be treated as his individual property, but as his contribution to the capital which he was bound to furnish under the agreement he had made with his copartners. In the case at bar he has accomplished practically the same result in a different way. He has not, it is true, sold his lands and put the proceeds in the money drawer of the firm; but he has mortgaged them, and, in effect, placed the mortgage in the money drawer. Capital may be contributed to a firm as well by way of a security as by actual cash, and whether that security be sold and the cash put in the till, or whether it be turned out as collateral to assist the firm in buying goods and obtaining credit, can make no difference with its real character. The allegations of the complaint seem to us to demonstrate that the bond and mortgages given to Shakman in fact amounted to a contribution to the capital stock of the firm made by Sommermeyer in pursuance of his partnership agreement, and must be so regarded in equity. In form, it was a security given by a partner upon his individual property; in fact, it was a contribution to the capital of the firm. This plainly constitutes what is termed by Story (1 Story's Equity Jurisprudence, sec. 645) a "supervening equity which must be considered," and, when considered, it plainly brings the case within the rule, because the two funds are thus, in the contemplation of equity, both partnership funds.

But a further well-established equitable rule is invoked by the defendant, and that is that equity will not marshal assets in the manner desired here, to the injury of the prior creditor: 8 Pomeroy's Equity Jurisprudence, sec. 1414. We are unable to see what substantial injury will be inflicted upon the defendant by requiring him first to exhaust his mortgage security, at least upon lands within this state. It is true, there must result some delay, in case foreclosure is necessary, but there will be no diminishing of security, because the fund realized from sale of the stock of goods should and must be kept intact pending the defendant's attempt to realize upon his mortgages. During this time, no part of his security will be taken from him. It is true that delay to the prior creditor has been sometimes spoken of as a bar to the relief here asked, but we are not ready to subscribe to



the doctrine that mere delay is sufficient to compel the court to deny the relief <sup>66</sup> when no other injury is involved. Some delay is a necessary consequence of the enforcement of all rights, and, if a possible delay would defeat the right of a junior creditor to have the assets of his debtor marshaled, such marshaling would rarely, if ever, take place. The true rule, we think, is well expressed in *Everston v. Booth*, 19 Johns. 486, where it is said that the relief will not be given "if it will endanger thereby the prior creditor, or in the least impair his prior right to raise his debt out of both funds," and it is further said that there is "no principle in equity which can take from him any part of his security until he is completely satisfied." Applying these principles to this case, we discover no ground on which to refuse the relief which the plaintiffs ask, if it shall prove that the allegations of the complaint are true. With the funds realized from the sale of the attached property in court, the defendant's rights are not endangered, nor his right to raise his debt out of both funds impaired, nor is any part of his security taken from him. It seems very questionable whether the court should require the defendant to foreclose the mortgages on the Minnesota and Dakota lands, because they are beyond the jurisdiction of the courts of this state: *Denham v. Williams*, 39 Ga. 312. But it is not necessary to decide this point on this demurrer, as we think that so far as the mortgages cover lands within this state, at least, the plaintiffs are entitled, under the allegations of the complaint, to some relief.

By the COURT. Order reversed, and action remanded with directions to overrule the demurrer.

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**MARSHALING SECURITIES.**—The doctrine of marshaling securities, as applied where one creditor may resort to two or more funds for payment, while another creditor may resort to but one of them, is discussed in *Hudkins v. Ward*, 30 W. Va. 204; 8 Am. St. Rep. 22, and note; *Ellis v. Temple*, 4 Cold. 315; 94 Am. Dec. 200, and note; *Eddy v. Traver*, 6 Paige, 521; 31 Am. Dec. 261; *Ramsey's Appeal*, 2 Watts, 228; 27 Am. Dec. 301; *Jones v. Zollicoffer*, 2 Hawks, 623; 11 Am. Dec. 795, and note; and *Cheesebrough v. Millard*, 1 Johns. Ch. 409; 7 Am. Dec. 494, and note.

## GRIGGS v. DOCTER.

[89 WISCONSIN, 151.]

**EXEMPTIONS.**—A CREDITOR WHO, TO AVOID THE EXEMPTION LAWS OF THE STATE, commences a garnishment in another may be enjoined from further prosecuting such proceeding, and compelled to relinquish any moneys he may have already realized therefrom.

ACTION to enjoin the prosecution of garnishment proceedings in the state of Iowa. Judgment was entered in favor of the complainant as prayed for, and also requiring the defendant to surrender certain moneys received as the fruits of such garnishment.

*Bloodgood, Bloodgood & Kemper*, for the appellants.

*Henderson & Williams*, for the respondent.

153 WINSLOW, J. There being no bill of exceptions, the only question presented is whether the pleadings and findings sustain the judgment: *Wills v. Barts*, 88 Wis. 424. This question must be answered in the affirmative. The pleadings and findings show, without dispute or exception, that the defendants, in order to evade the exemption laws of the state, commenced garnishment proceedings in a foreign state in order to subject the exempt earnings of a resident of this state to their claims as creditors, and, in defiance of the interlocutory order of the court, actually appropriated sixty dollars of the plaintiff's exempt wages to the payment of their debt. Why the court should not have administered the relief which it did administer we are at a loss to perceive. The jurisdiction of equity in actions of this nature is well established: *High on Injunctions*, 2d ed., sec. 106.

154 It is said that the judgment is erroneous, because it enjoins the defendants so long as the plaintiff remains a resident of this state, whereas it should be limited to such time as the plaintiff, being a resident of this state, provides for the entire support of a family within the state. If there is any thing in this point, the objection is obviated by the subsequent words of the judgment, which limit the operation of the injunction to those earnings which are exempt.

That part of the judgment which adjudges the recovery of the sixty dollars which the defendants collected by their garnishment in the Iowa court in disobedience to the preliminary injunctive order was eminently proper. A court of equity would hardly deserve that name if it turned the plaintiff out

of court with a bare injunction, and commanded him to seek his remedy by another action for the moneys thus wrongfully converted in contempt of an order of the court made in this very action.

By the COURT. Judgment affirmed.

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**INJUNCTION TO RESTRAIN VIOLATION OF EXEMPTION LAWS.**—If a creditor and debtor are citizens of and reside in the same state, and the creditor institutes an action by attachment and garnishee proceedings in another state to reach property or credits due the debtor there and exempt from legal process in the state where the parties are domiciled, such creditor may be enjoined from further prosecuting his action in the other state: *Allen v. Buchanan*, 97 Ala. 399; 38 Am. St. Rep. 187, and note. See further the extended note to *Mussey v. Wilson*, 2 Am. St. Rep. 242.

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## SEAMANS v. KNAPP-STOUT & Co. COMPANY.

[89 WISCONSIN, 171.]

**INSURANCE CORPORATIONS MAY, IN THE STATES WHEREIN THEY ARE CREATED, INSURE PROPERTY SITUATE IN ANOTHER STATE** by whose laws they are forbidden to do business therein; whereas if the contract of insurance were entered into in the latter state it would be void.

**CONTRACT, WHERE DEEMED TO HAVE BEEN MADE.**—If insurance is solicited in another state by a broker, and the property owner there consents to take insurance in companies acceptable to such broker, who thereupon requests an insurance corporation of this state to write such insurance, and it, at its office in this state, fills out an application for the insurance, and prepares a premium note to be signed by the property owner, and transmits the note and application to him, and at the same time fills out a policy of insurance, all these papers being dated at its home office, and stipulating that the contract of insurance shall be governed by the laws of this state, and the papers are then sent to the brokers, and by them mailed to the property owner, who, on his part, then answers the questions contained in the contract, signs the premium note, accepts the policy, transmits the application and note and a cash premium to the brokers, who in turn send them to the insurer in this state, the contract of insurance is not completed until the note and application are accepted by the insurer, and hence must be deemed to have been made in this state.

**ACTION** by the plaintiff, Seamans, as receiver of the Milwaukee Mutual Fire Insurance Company, a corporation organized, existing, and doing business under the laws of Wisconsin. The defendant, being the owner of certain personal property at Fort Madison, Iowa, and also at St. Louis, Missouri, procured policies of insurance thereon, in consideration of which it gave certain premium notes upon which

plaintiff sought to recover in this action. The defendant insisted that the contracts sought to be enforced were executed in violation of the laws of Iowa and of Missouri, and were therefore void. Certain insurance brokers doing business at Chicago solicited the insurance of the defendant at its office in Missouri, and it then consented to take insurance in acceptable companies from such brokers. They then applied by letter to the Milwaukee Fire Insurance Company to write policies of such insurance. Thereupon it, at its office in Milwaukee, filled out an application, with a note at the bottom thereof, together with a policy of insurance insuring the property of the defendant. The application, note, and premium were mailed to the brokers at Chicago, and by them in turn mailed to the defendant at St. Louis. It then and there accepted the policy of insurance, answered the questions in the application, signed the application and accompanying premium note, and returned them with a cash premium to the brokers, who thereupon mailed the application and premium note to the insurance company, and sent to it that part of the cash premium due to it after deducting the commissions of the brokers. These brokers were not agents of the insurance company, and never had any authority to write policies for it, nor were they ever employed to solicit insurance for it. Judgment in favor of the plaintiff, from which the defendant appealed.

*La Boule & Hunt*, for the appellant.

*George E. Sutherland*, for the respondent.

178 CASSODAY, J. The insurance company and the defendant corporation were each created and organized under and by virtue of the laws of this state, and exist only by force of the laws of this state. Since such laws of themselves have no extraterritorial force, these corporations cannot migrate to other states, but must dwell in the state of their creation: *Larson v. Aultman*, 86 Wis. 283, 284; 39 Am. St. Rep. 893, and cases there cited. While these corporations can only live and have their being in this state, yet their residence here creates no insuperable objection to their power to contract and be contracted with in other states, provided they do so in accordance with the laws of such other states. One of the policies issued by the insurance company covered certain personal property of the defendant located in Iowa,

and the other covered certain personal property of the defendant located in Missouri. The authority of each of those states to prescribe the conditions upon which each of said corporations would be allowed to make contracts and do business <sup>179</sup> therein must be conceded: *State v. United States Mut. etc. Assn.*, 67 Wis. 629; *Stanhilber v. Mutual etc. Ins. Co.*, 76 Wis. 291; *State v. Root*, 83 Wis. 680. No question is made as to the right of the defendant to make valid contracts and do business in Iowa or Missouri. But it is conceded that the insurance company never complied with such conditions so prescribed by those states, respectively, and that, by the statutes of each of those states, any contracts made by that company therein were absolutely void.

But each of the contracts for the insurance of such property against loss by fire was a mere contract for indemnity in case of loss: *Darrell v. Tibbitts*, 5 Q. B. Div. 560; *Stanhilber v. Mutual etc. Ins. Co.*, 76 Wis. 291. Although it related to the loss of such property, yet it in no way attached to or affected the title to such property. Such being the nature of the contracts sued upon and the residence of the two corporations, there would seem to be no good reason why they could not, within the state of Wisconsin, make valid contracts for indemnity against loss by fire of such properties, notwithstanding the same were located in such other states. This seems to be conceded by counsel for the defendant. The vital question in the case, therefore, is whether these contracts were made in Wisconsin or in the respective states where the properties were located.

The negotiation for the insurance upon the Iowa property was commenced by the Chicago brokers, who solicited insurance of the defendant's agent in Missouri, to be written in mutual companies. The defendant thereupon consented to take insurance in acceptable companies from such brokers upon the mutual plan upon its property located at Fort Madison, Iowa. Said brokers then, by letter, requested the Milwaukee Mutual Fire Insurance Company to write a portion of such insurance. That company thereupon, at its office in Milwaukee, filled out a blank application for such insurance, <sup>180</sup> with a premium note at the bottom, to be signed by the defendant, and said application contained some twenty questions for the defendant to answer by writing in the several answers. At the same time, at its office in Milwaukee, that company filled out a policy for such insurance, and such

application, note, and policy were each and all dated at Milwaukee, December 8, 1888, and said policy recited that the application and premium note had been given and were on file in the company's office at Milwaukee; that such application was a part of the contract of insurance, and a warranty on the part of the insured; that, if certain conditions existed, the policy should be void; that the charter and by-laws of the company, and the laws of Wisconsin under which it was organized, were thereby declared to be a part of the contract of insurance, and to be resorted to in order to determine the rights and obligations of the parties thereto. Said blank application, blank note, and policy so filled out were thereupon mailed by the insurance company to the Chicago brokers, and by them mailed to the defendant at its St. Louis office. The defendant thereupon accepted the policy, answered the several questions contained in the blank application, and signed the same, and signed said blank premium note, and thereupon returned the application and premium note, so signed, together with the cash premium, to the Chicago brokers, who receipted therefor; and thereupon said brokers mailed said application, note, and cash premium, less twenty per cent thereof, to the insurance company. The contract to insure the property in Missouri was procured substantially in the same way, except that the brokers were located at St. Louis instead of Chicago.

We are constrained to hold that the application, premium note, and policy must be taken and construed together as one instrument, constituting the contract of insurance: *Herbst v. Lowe*, 65 Wis. 320. This being so, we must hold that the policy, blank application, and blank premium note, <sup>161</sup> so made out by the insurance company and mailed as mentioned, were a mere proposition by that company to insure the property in case the cash premium should be paid, the premium note should be signed by the defendant, and the several questions propounded in the application should be answered to its satisfaction. Certainly it was possible that those several questions might have been answered in such a way that neither the Milwaukee company nor any other company would be justified or expected to insure the property. The trial court rightly held that the persons so soliciting the insurance were insurance brokers, and in no sense agents of the Milwaukee company; that, in so far as they were agents for any one, they were agents of the defendant. This being

so, it necessarily follows that the contract of insurance did not become complete and absolutely binding upon both parties until the note and application were filled out and signed, and submitted to, and in effect approved by, the insurance company. The contract, therefore, must be deemed to have been made at Milwaukee, where the final assent was given: *Whiston v. Stodder*, 8 Mart. (La.) 95; 13 Am. Dec. 281; *Ford v. Buckeye State Ins. Co.*, 6 Bush, 133; 99 Am. Dec. 663, and notes; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Mactier v. Frith*, 6 Wend. 103; 21 Am. Dec. 262; *Milliken v. Pratt*, 125 Mass. 374; 38 Am. Rep. 241.

"When a contract is made in one country, to be performed wholly or partially in another, prima facie the contract is to be construed and enforced according to the *lex loci contractus*; but the court will look at all the circumstances to ascertain by the law of which country the parties intended the contract to be governed, and will enforce the contract accordingly, unless it should contain stipulations contrary to morality or expressly forbidden by positive law": *In re Missouri Steamship Co.*, 42 Ch. Div. 321. The contract in that case was made in Massachusetts, between an American citizen and a British company, for the carriage of cattle <sup>182</sup> from Boston to England in a British ship, and contained a clause void as against public policy by the law of Massachusetts, but valid by the law of England, and it was held that the contract itself showed that the parties intended to be governed by the law of England, giving effect to the clause mentioned. This is upon the well-established principle that when a contract is open to two constructions, the one lawful and the other unlawful, the former must be adopted: *Hobbs v. McLean*, 117 U. S. 567; *United States v. Central Pac. R. R. Co.*, 118 U. S. 236. Much of the seeming conflict in the adjudications upon the subject of the *lex loci contractus* will disappear by carefully discriminating as to the precise nature of the issue and matter under consideration. Thus, it was held by the supreme court of the United States that "Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy depend upon the law of the place where the suit is brought": *Scudder v. Union Nat. Bank*, 91 U. S. 406. Here the only question presented is as to the

validity of the contract, and that is necessarily governed by the law of the place where it was made, which, as observed, is the law of Wisconsin.

By the COURT. The judgment of the circuit court is affirmed.

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**INSURANCE BY FOREIGN CORPORATION — VALIDITY OF POLICY.** — If an insurance corporation organized and doing business in this state solicits insurance in another, and there receives an application and a premium note which is dated at its home office in this state, to which the note and application are sent and from which a policy issues the contract is deemed to be made here, and is controlled by the laws of this state, and not by the laws of the state in which the property insured is situated: *Marden v. Hotel Owners' Ins. Co.*, 85 Iowa, 584; 39 Am. St. Rep. 316, and note, with the cases collected. But in *Wood v. Cascade etc. Ins. Co.*, 8 Wash. 427, 40 Am. St. Rep. 917, it was held that if the laws of a state regulating the business of insurance therein declare that all insurance effected by foreign corporations which have not complied with such laws is unlawful and void, and of no effect whatever, a policy issued in violation of this rule is void, not only in that state, but in every other, and hence no recovery can be had thereon in the state in which such corporation was organized. The cases on this subject are further collected in the note to the latter case: See, also, the case of *Rose v. Kimberly etc. Co.*, 89 Wis. 544; post, p. 000.

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## CHAPMAN VALVE MANUFACTURING COMPANY v. OCONTO WATER COMPANY.

[89 WISCONSIN, 264.]

**A MECHANIC'S OR MATERIALMAN'S LIEN CANNOT BE ENFORCED AGAINST A SYSTEM OF WATERWORKS,** nor any part thereof, constructed for the purpose of supplying a city and its inhabitants with water for protection against fire and for domestic, manufacturing, and other purposes, though such works do not belong to the city, but to a corporation organized under a statute of the state and authorized by an ordinance of the municipality.

SUIT to enforce an alleged mechanic's lien against the defendant's waterworks system or plant, or, if that should be denied, then against certain valves therein which had been furnished by the plaintiff. The defendant was a corporation organized under the statutes of the state for the purpose of supplying the city of Oconto and its inhabitants with water for protection against fire, and for domestic, manufacturing, and other purposes. It had by an ordinance of the common council been authorized to construct, maintain, and operate such waterworks for the period of thirty years. These works



after completion were accepted by the common council as being constructed in conformity with the ordinance. The trial court decided that upon grounds of public policy the lien law of the state did not apply to the waterworks system of the defendant, and gave merely a personal judgment against it for the amount of the plaintiff's claim. The plaintiff thereupon appealed.

*Miller, Noyes & Miller*, for the appellant.

*Webster & Martineau*, for the respondent.

<sup>271</sup> **NEWMAN, J.** The instant case is an action for a statutory lien upon the entire waterworks plant of the defendant, or, if that is denied, upon the valves furnished by the plaintiff, as machinery which may be removed.

In *Wilkinson v. Hoffman*, 61 Wis. 637, this court held, on grounds of public policy and convenience, that a mechanic's lien was not given by section 3314 of the Revised Statutes against machinery placed in a building which was a part of a waterworks plant owned by a city and held for public use. It was said that: "The public inconvenience which would result from having such machinery removed is too obvious and grave to require any discussion. The comfort, health, safety, and property of the citizens would be greatly endangered by allowing the facilities for procuring water to be suspended, even for a short period. In view of the serious consequences which would result by allowing the lien to attach to machinery thus used, and which more than counterbalances any private advantage, we are inclined to hold that the provision does <sup>272</sup> not apply in the case before us." And so the court held, "on grounds of public necessity and convenience," that a lien was not given by the statute on property so held for public use.

The city of Oconto has provided for the supply of the water necessary for its protection against fire, and for all the uses of its citizens, by a contract with the defendant, which is a corporation specially organized for that purpose, for the term of thirty years. The defendant's system of waterworks was constructed under an ordinance of the city, which directed, in considerable detail, the manner of its construction, extent and capacity of the plant, and the manner of its operation. It also gave it a franchise to construct and operate its works for thirty years. After the plant was completed the city

accepted it by an ordinance which declared it to be constructed in accordance with the ordinance and the franchise conferred. In this manner the city provided itself with a system of waterworks for the protection and convenience of its inhabitants. It became and was the waterworks of the city of Oconto. It is manifest that the inconvenience and danger which must result from a stoppage of the operation of the waterworks, or from any interference with their use and operation, to the city and to its inhabitants, would be equally grave and important, whether the system was owned and operated by the city or whether the city owned only the right to have it operated for its benefit, and for the benefit and protection of its citizens. The effect of enforcing a lien upon the valves, as machinery which might be removed, would be to dismantle the plant and stop its operation for a time at least, and to deprive the city and its inhabitants of its protection and use in either case. So the case comes within the rule of *Wilkinson v. Hoffman*, 61 Wis. 637, and the lien upon the valves must be denied.

To extend the lien over the entire plant would bring a like <sup>273</sup> mischief and inconvenience. The lien could, by the terms of the statute, extend only to and include the entire plant, with all the interest which the defendant has in the land on which the plant is situated. The statute, in terms, gives no more. The defendant has an oral contract with the city for the purchase of the lots on which its pumping works stand, and the franchise to lay its main pipes and hydrants in the streets. It has no other or further interest in the land. Perhaps this is a sufficient interest to support a lien, in an ordinary case, upon the plant, with the interest in the land. But in terms the statute gives no more. It gives no lien upon or right to sell the franchise to operate the works. Whether the statute shall be extended by construction to cases not within its express terms may depend somewhat on its subject matter as related to questions of public policy and convenience. The effects and consequences which may result from an enlarged construction of the statute may be considered in determining its proper construction. If it shall be held that the plaintiff has a lien which covers the plant, then the plant may be sold to satisfy the lien. It will then come to a purchaser who has no franchise to operate it, for the statute does not give a lien upon the franchise. Nor does it provide that the franchise shall follow the plant on sale under

a lien judgment. Nor does the franchise follow the plant by force of the rule that the incident follows its principal. If that maxim has any application, it should be considered that the franchise is the principal thing. All other rights spring from the franchise. The franchise is a grant in gross of an incorporeal hereditament, and is not appurtenant to any particular land or property: *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322. It would not follow the plant on sale under a lien judgment. It is neither subject to the lien, by provision of the statute, nor follows the plant on sale as an incident follows its principal. It is not appurtenant to the plant. Nor can the <sup>274</sup> plant be sold separately from the franchise to operate it. The franchises and corporate rights of a company, and the means vested in them, which are necessary to the existence and maintenance of the object for which they were created, are incapable of being granted away or transferred by any act of the company itself, or by any adverse process against it, unless it is authorized by a statute: *Yellow River Imp. Co. v. Wood Co.*, 81 Wis. 554; *Foster v. Fowler*, 60 Pa. St. 27; 8 Am. & Eng. Ency. of Law, 634, and cases cited in notes. To sell the plant to a purchaser who had no franchise to operate it would work all the public mischief and inconvenience which its total destruction would cause. Besides, a sale of the plant separate from the franchise would be a delusive remedy to the plaintiff. The plant without the franchise is practically without value, a consideration which shows that that cannot be the plaintiff's remedy. Nor has a court of equity power to extend the lien over rights not made subject to it by the statute. So it must be held that no mechanic's lien is given by the statute upon a waterworks plant which a city has provided for the protection and convenience of its citizens by a contract with a corporation organized for that purpose.

The court has not overlooked nor failed to appreciate the force of the learned and industrious opinion upon these same questions of Mr. Justice Jenkins, in the United States circuit court for the eastern district of Wisconsin, against the same defendant (*National etc. Works v. Oconto Water Co.*, 52 Fed. Rep. 48), and affirmed by the circuit court of appeals: *Oconto Water Co. v. National etc. Works*, 7 Cir. Ct. App. 603; 59 Fed. Rep. 19. While this court entertains the highest respect for the opinions of those learned courts, and for the distinguished ability of the judges who have pronounced and affirmed that

decision, it has yet felt constrained to a different judgment by the force of its former decisions and by the logic of the situation. It is considered that the view it has <sup>275</sup> taken in this opinion is in accord with the weight of authority and of the better reason.

By the COURT. The judgment of the circuit court is affirmed.

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**MECHANIC'S LIEN AGAINST PROPERTY OF QUASI PUBLIC CORPORATION.**—The property of an electric light corporation having a franchise from a city to occupy its streets in the transmission of light to its inhabitants is subject to a mechanic's lien under a statute granting such lien to any mechanic or other person who shall, under contract with the owner of any tract of land, perform labor or furnish material for erecting, altering, or repairing any building or appurtenance to any building, or any erection or improvement: *Badger Lumber Co. v. Marion Water etc. Co.*, 48 Kan. 187; 30 Am. St. Rep. 306, and note. See, further, the extended note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 696-698.

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## **BALLIN v. MERCHANTS' EXCHANGE BANK.**

[80 WISCONSIN, 273.]

**CORPORATIONS—TRUST FUND DOCTRINE.**—A CREDITOR, KNOWING A CORPORATE DEBTOR TO BE INSOLVENT, may attach its property, and, by so doing, obtain a lien and preference which other creditors cannot compel him to surrender or share with them.

**PRACTICE—CODEFENDANTS' RIGHT TO RELIEF AS AGAINST ONE ANOTHER.**—Defendants who merely answer the complaint of the plaintiff, though in doing so they aver that creditors of another class have been guilty of bad faith and collusion, are not entitled to affirmative relief against other codefendants. To obtain that they should interpose a cross-complaint.

*Winkler, Flanders, Smith, Bottum & Vilas, and Bloodgood, Bloodgood & Kemper*, for the appellants.

*O. T. Williams, and Miller, Noyes & Miller*, for the respondents.

<sup>285</sup> **WINSLOW, J.** A creditor of an insolvent corporation, knowing its insolvency, attaches its property, without collusion with the officers of the corporation. Afterward, and while the attached property is in the hands of the officer, another creditor obtains judgment and commences an action, under section 3216 of the Revised Statutes, to close up its affairs and sequester its property, making the attaching

creditor and the officer parties to the suit. Can the attaching creditor be deprived of his lien upon the property attached, and be compelled to share equally with all other creditors in the property of the corporation? This is the single question which is sharply presented in this case.

The complaint charged a fraudulent and collusive attachment by the first class of creditors; and a preliminary order, based on this complaint, requiring the sheriff to surrender the attached property to the receiver, was affirmed by this court: *Ballin v. Loeb*, 78 Wis. 404. The ultimate rights of the attaching creditors were not determined on that appeal, however; but it was held that they must come into this action for any share of the proceeds of the property, or for any remedy against it. The effect of that decision was simply to hold that the receiver was entitled to the possession of the property for the purpose of winding up the affairs of the corporation, and that all claims of liens upon the property must be litigated in this action. On the trial the plaintiffs abandoned all charges of collusion and fraud, and rested solely on the ground of the corporation being insolvent, and that the attaching creditors had knowledge of such insolvency when they attached. And thus the question presents itself, ~~see~~ as first above stated. Upon this question the plaintiffs rest their case upon the so-called "trust fund" doctrine, and take a broad ground that from the moment a trading corporation becomes insolvent its assets become a trust fund for the benefit of its creditors, and that no creditor, knowing of its insolvency, can obtain a valid lien by attachment of any of the property; and they argue that this doctrine has received the express or implied sanction of this court.

It must be admitted that there are authorities in other jurisdictions holding this doctrine to its full extent, but it certainly has not yet been held by this court that a creditor of an insolvent corporation may not obtain a valid lien by attaching its property in a bona fide attempt to collect his debt. The cases which are principally relied upon by the plaintiffs as having sanctioned the trust fund doctrine in this court are *First Nat. Bank v. Knowles*, 67 Wis. 373; *Haywood v. Lincoln etc. Co.*, 64 Wis. 639; *Ballin v. Loeb*, 78 Wis. 404; *Ford v. Plankinton Bank*, 87 Wis. 363. A brief review of the questions actually decided in these cases will be useful. In *Haywood v. Lincoln etc. Co.*, 64 Wis. 639, it was held that directors of an insolvent corporation could not lawfully con-

vey or mortgage the corporate property to themselves to secure their own claims against the corporation. In *First Nat. Bank v. Knowles*, 67 Wis. 373, it was held that a trust deed of an insolvent manufacturing corporation to secure bonds given to certain creditors, some of whom were directors of the corporation, was void because made with the intent to hinder, delay, and defraud other creditors, and because it had the effect of a fraudulent preference of certain creditors to the exclusion of all others. In *Ballin v. Loeb*, 78 Wis. 404, it was held (as previously stated in this opinion) that an attaching creditor of an insolvent corporation, whose attachment was charged to have been fraudulent and collusive, must come into this action and assert his rights to a lien upon the attached property. The same, in principle, was the holding in *Ford v. <sup>287</sup> Plankinton Bank*, 87 Wis. 363. In the last-named case it was charged that judgments by confession had been collusively and fraudulently obtained and levies made thereunder; and it was held that the property levied upon must go into the hands of the receiver, and that a creditor must seek and enforce his lien, if any, in the sequestration action. On the other hand, in *Garden City etc. Co. v. Geilfuss*, 86 Wis. 612, it was distinctly held that where an insolvent corporation had made a valid assignment for the benefit of its creditors under the statute, such assignment was not superseded or affected by the appointment of a receiver in an action against the corporation under section 3216 of the Revised Statutes. We believe the foregoing is a fair statement of the questions actually presented and decided in the cases named, and from this statement it seems very certain that the question here presented has not been foreclosed or decided by this court.

The intangible body known to the law as a corporation must necessarily act by its agents, and these agents are its managing officers. An agent who is handling the funds or property of his principal acts in a trust capacity, and is, in a sense, a trustee. The managing officers of the corporation are therefore at all times trustees for the corporation and its stockholders. It may also be correctly said that the corporate property in the hands of the receiver is a trust fund for the benefit of creditors, in the sense that it is to be applied to the payment of the corporate creditors before it can be applied for the use or benefit of the stockholders. The plaintiff's contention is broader than this, and is to the effect that when

a corporation in fact becomes insolvent, though still doing business, the managing directors thereof become trustees of the corporate property, in the full and complete sense of the term, and can make no disposition of such property to one creditor to the exclusion of others, nor can a creditor, acting in good faith, acquire a valid lien upon the corporate property by attachment. As to the <sup>288</sup> first branch of this proposition, to the effect that the directors cannot convey or mortgage the corporate property to a creditor, we are not now concerned, because that question does not arise in this case. The sole question here is whether a diligent creditor, knowing of the corporate insolvency, and bringing his attachment proceedings in an honest effort to collect his debt, can acquire a valid lien upon the corporate property, which will be protected upon a subsequent sequestration action. Upon this question we have no hesitation in holding that such a creditor will acquire a valid lien. To hold otherwise is to hold, in effect, that a debt cannot be collected by ordinary processes of law from an insolvent corporation; that the corporation may buy and sell, make contracts, and transact its ordinary business, but that it enjoys a practical immunity from all the laws for the enforcement of its obligations, until some creditor sees fit to commence an action to wind up its affairs. In other words, it may buy property, but cannot be compelled by ordinary processes of law to pay for it; it may contract, but cannot be compelled to perform its contract; it is provided with a shield which becomes, to all intents and purposes, a sword in its hands against the diligent creditor. Certainly no such immunity from the ordinary laws governing the rights of creditors is given it by statute. On the contrary, the statute provides (Rev. Stats., sec. 2729) that any creditor may proceed by attachment against the property of his debtor, "whether a natural person or corporation"; and in vain do we look for any exception in the statute law, such as is claimed here. We shall not attempt to ingraft any such exception on the statute by decision. We see no good reason why a trading corporation, so long, at least, as it deals with others in its ordinary course of business, should not be subject to the ordinary remedies provided by the law for the collection of debts. Its property is certainly not trust property in the sense that it cannot be relied on by its <sup>289</sup> creditors to respond to the ordinary processes of the law sued out in good faith. The following

authorities fully bear out these views, and we cite them as sustaining the point now decided, without affirming or denying their correctness in other respects: *White etc. Mfg. Co. v. Henry B. Pettes Importing Co.*, 30 Fed. Rep. 864; *Hospes v. Northwestern Mfg. Co.*, 48 Minn. 174; 31 Am. St. Rep. 637; *Fogg v. Blair*, 133 U. S. 534; *Hollins v. Brierfield etc. Co.*, 150 U. S. 371; *Roseboom v. Whittaker*, 132 Ill. 81. From these views it follows that the first class of creditors were, upon the facts before the court, entitled to have their attachment liens adjudged valid, and to be first paid out of the proceeds of the attached property in the hands of the receiver, and hence that the order of the superior court must be reversed.

Another question now arises on the appeal of the third class of creditors. They claim, in the event of reversal, the case should be remanded for a new trial, in order that they may litigate the good faith of the attachments levied by the first class of creditors, which they allege in their answer were collusive and fraudulent. The difficulty is that they are not in a position to litigate the question. It is true they allege bad faith and collusion by the first class of creditors, but they only did so by way of answer to the plaintiff's complaint. They did not even allege the facts as a counterclaim, nor was the answer served on the defendants whose rights they seek to attack. They have neither formed nor attempted to form any issue with their codefendants. Such a question arising between defendants must undoubtedly be raised by an appropriate pleading which the codefendants whose rights are assailed have an opportunity to answer. It would seem to be necessary to do this by cross-complaint, as under the old equity practice: *Trester v. Sheboygan*, 87 Wis. 496; 1 Van Santvoord's Equity Practice, 2d ed., 224. Certainly, no such issue having been tendered or raised by the third class of creditors, the first class of creditors are <sup>290</sup> not called upon to meet it. They are only required to meet the plaintiffs' claims, and the plaintiffs having abandoned all claims of fraud and collusion, as they had a perfect right to do, that issue has disappeared from the case so far as the first class of creditors are concerned.

By the COURT. So much of the order appealed from as provides for an equal distribution among creditors of all property in the hands of the receiver, and denies any preference, and enjoins further proceedings by the defendants, is



reversed with costs, upon both appeals, and the remainder of the order is affirmed, and the action is remanded for further proceedings in accordance with law.

**CORPORATIONS—INSOLVENCY—PREFERENCE.**—A creditor, not a director, who has no interest in an insolvent corporation other than that of its creditor, is not a trustee, and has the right to sue by attachment, and thus acquire a superior lien to any and all other creditors, although advised to attach by a director of the corporation: *La Grange Butter Tub Co. v. National Bank*, 122 Mo. 154; 43 Am. St. Rep. 558, and note.

**JOINT LIABILITY RIGHT OF CODEFENDANTS TO RELIEF AS AGAINST ONE ANOTHER.**—There can be no decree between codefendants, or recovery by one codefendant against the other, when the complainant is entitled to no relief: *Western Lunatic Asylum v. Miller*, 29 W. Va. 326; 6 Am. St. Rep. 644.

## COMBES v. KEYES.

[89 WISCONSIN, 297.]

**A CORPORATION DWELLS WITHIN THE STATE OF ITS CREATION, AND CANNOT MIGRATE** to another, though it may there contract and exercise such other corporate franchise as the laws of that state permit.

**CORPORATIONS—DISSOLUTION AND DESTRUCTION OF BY FAILURE TO EXERCISE CORPORATE RIGHTS AND FRANCHISES.**—If a corporation, by virtue of a judicial sale, is deprived of all its property and franchises, and thereafter continues for a quarter of a century to have no property or franchises, and no business or place of business, during all of which time it fails to elect any officers or keep any office, it will be presumed to have surrendered, and the state to have accepted, its franchises, and to have terminated its corporate existence.

**CORPORATIONS.**—A JUDGMENT RENDERED AGAINST A CORPORATION AFTER ITS DISSOLUTION, or after a surrender by it and an acceptance by the state of its corporate rights and franchises, is void. A defunct corporation cannot be brought into court by any process whatever.

**PRACTICE.**—IN AN ACTION AGAINST A DISSOLVED OR DEFUNCT CORPORATION it is proper for one who has been its secretary to give and inform the court of the facts which had worked the corporate dissolution and death.

*C. H. Van Alstine and John W. Cary*, for the appellant.

*Hugh Ryan*, for the respondent.

<sup>206</sup> **CASSODAY, J.** The Milwaukee & Minnesota Railroad Company was organized, under the general statutes, May 23, 1859. It thereupon acquired by conveyance from Barnes, through a foreclosure of the Barnes mortgage and a sale thereon to Barnes, all the rights, property, and franchises <sup>207</sup> of the La Crosse & Milwaukee Railroad Company, sub-

ject, however, to three mortgages on the eastern division, and two mortgages on the western division, and several judgments on the respective divisions, including one in favor of Newcombe Cleveland. Prior to April 18, 1866, the Milwaukee & St. Paul Railroad Company acquired the title and possession of the western division, through the foreclosure of the first mortgage thereon and a sale thereunder. The La Crosse & Milwaukee Railroad Company was expressly authorized by its charter, and the amendments thereto, to mortgage all of its estate, real, personal, or mixed, "together with the functions appertaining to said railroad, and all corporate and other franchises, rights, and privileges" of said company; and hence, by that foreclosure and sale, the same were vested in the Milwaukee & St. Paul Railroad Company. March 2, 1867, the Milwaukee & St. Paul Railroad Company acquired the title and possession of the eastern division, under and by virtue of a marshal's sale and conveyance to it on a decree entered in the federal court January 11, 1867, as mentioned, in a suit in equity in favor of the assignee of the Cleveland judgment, and against the Milwaukee & Minnesota Railroad Company, to enforce that judgment as a lien thereon. Since March 2, 1867, the name of the Milwaukee & St. Paul Railroad Company has been changed to the Chicago, Milwaukee, & St. Paul Railway Company, and the same has ever since been in possession, and operated said railroad as owner thereof.

Prior to the marshal's sale and conveyance mentioned the Milwaukee & Minnesota Railroad Company had a board of directors, who had severally been elected at the time and place and in the manner prescribed by the statutes of this state, and such board had elected a president, secretary, and treasurer of that company, who had respectively acted as such officers down to the time of the marshal's sale and conveyance mentioned. Independently of statute, it was ~~was~~ the duty of that company, during its existence, to have an office and officers within this state: *State v. Milwaukee etc. Ry. Co.*, 45 Wis. 579. It appears that no notice of the election of any such directors for that company was ever given, and no appointment of any inspectors of any such election was ever made as prescribed by statutes after 1866, and that after April, 1867, there never was any meeting in Wisconsin of the stockholders or directors of said company for any purpose; that since that time said company has neither owned,

possessed, nor had any property in this state, nor been engaged in any business therein, and at the time of the commencement of this action it had no agent or officer therein.

The question recurs whether the Milwaukee & Minnesota Railroad Company has any legal existence in this state, so as to entitle it to sue and be sued. That company was incorporated and organized under and by virtue of the laws of this state over thirty-five years ago, and existed only by force of the laws of this state. Since such laws, of themselves, had no extra-territorial force, that corporation could not migrate to some other state or country, but during its existence was bound to dwell in this the state of its creation: *Seamans v. Knapp-Stout etc. Co.*, 89 Wis. 171, *ante*, p. 825; *Larson v. Aultman*, 86 Wis. 283, 284; 39 Am. St. Rep. 893; *Bank of Augusta v. Earle*, 13 Pet. 588; *Shaw v. Quincy Min. Co.*, 145 U. S. 449. While it could only live and have its being in this state, yet its residence here created no insuperable objection to its power to contract and be contracted with in other states, and having its legal existence recognized in such other states. But any exercise of its corporate franchises in such other states was merely permissible by virtue of the comity of such states: *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566.

Such being the law, it is very manifest that, if the Milwaukee & Minnesota Railroad Company had any legal existence <sup>300</sup> at the time of the commencement of this action, such existence was confined within the limits of this state. And yet the sheriff's return is to the effect "that, after due diligence, search, and inquiry," he could not find that company within his county, nor any officer or agent of the same within the state. The same condition of things, as to that company in this state, had existed ever since April, 1867. If, during those twenty-six years, it existed in this state at all, such existence was without any definite location, intangible, and unascertainable. The case is not one of a defendant whose "residence is unknown," or who "keeps himself concealed" within the state, with the intent to "avoid the service of a summons," within the meaning of the statute: Rev. Stats., sec. 2639. The service of the summons by publication in this case is sought to be justified upon the sole ground that the defendant is a "private corporation organized under the laws of the state, and the proper officers on whom to make service . . . cannot be found": Rev. Stats., sec. 2639.

The statute declares, in effect, that whenever any corporation shall have neglected or refused to pay and discharge its debts, "or shall have suspended its ordinary and lawful business for one whole year, it shall be deemed to have surrendered the rights, privileges, and franchises granted or acquired under any law, and shall be adjudged to be dissolved": Rev. Stats., sec. 1763. But this court has repeatedly held that such neglect, refusal, or suspension "for one whole year" does not *ipso facto* operate as a dissolution of such corporation, but simply declares an efficient cause for adjudging a dissolution in a proper action: *Strong v. McCagg*, 55 Wis. 624; *Sleeper v. Goodwin*, 67 Wis. 577. The statute also prescribes, in effect, that where the existence of a corporation expires by its own limitation, or is voluntarily dissolved in the manner provided by law or by its articles of association, or is annulled by forfeiture or otherwise, nevertheless it <sup>210</sup> shall continue to exist for three years for certain purposes: Rev. Stats., sec. 1764; *Sleeper v. Goodwin*, 67 Wis. 584. So the statute authorizes the dissolution of a corporation by a written resolution in certain cases: Rev. Stats., sec. 1789.

It must be remembered that the Milwaukee & Minnesota Railroad Company acquired the rights, property, and franchises of the La Crosse & Milwaukee Railroad Company by virtue of the foreclosure and sale of the Barnes mortgage; that it took such rights, property, and franchises subject to the prior mortgages and prior judgments mentioned; that the purpose of its incorporation and organization was to operate the railroad thus acquired between the points mentioned; that prior to April, 1867, it had been completely ousted and dispossessed of the entire railroad, and every part thereof, under and by virtue of the foreclosure and sale and the decree in equity and sale mentioned; that all such rights, property, and franchises thereby and thereupon became vested in the St. Paul company, which for more than twenty-six years prior to the commencement of this action, and since, has had the possession and control of the entire line of railroad and every part thereof, and during all that time operated the same as a railroad, with the repeated express or implied sanctions of the legislature of this state; that during the same time the Milwaukee & Minnesota Railroad Company has not owned nor possessed any railroad, nor does it appear that it has attempted to construct any. The contention of counsel for the plaintiff seems to be to the effect that while

the Milwaukee & Minnesota Railroad Company had, by virtue of the sales and conveyances mentioned, been deprived of the entire railroad and its property and its franchises, as a corporation, to maintain and operate the same, yet that it still possesses a franchise to be a corporation, and hence may still sue and be sued. Conceding that a franchise to be a corporation may, under certain circumstances and for certain purposes and for a limited time, exist <sup>311</sup> without any franchise to maintain and operate such corporation, still the question here presented is whether any such franchise to be a corporation survived to the Milwaukee & Minnesota Railroad Company after the transfers made under the circumstances mentioned, and for the length of time named.

Undoubtedly, a private corporation may dissolve itself and terminate its corporate existence by a voluntary surrender of its franchises to the state. To make the surrender complete, however, it must be accepted by the state: 4 Am. & Eng. Ency. of Law, 296, and cases there cited. It would seem that after such corporation had been stripped of all its property, and for twenty-six years had failed to exercise any corporate franchise, or elect any officer in this state, or keep any office therein, such surrender would be presumed: *Brandon Iron Co. v. Gleason*, 24 Vt. 228. And so it would seem that, where a corporation suffers acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights: *Slee v. Bloom*, 19 Johns. 456; 10 Am. Dec. 273; *Briggs v. Penniman*, 8 Cow. 387; 18 Am. Dec. 454. It has been held that a seizure and sale of the franchises of a corporation effect its dissolution: *State Bank v. State*, 1 Blackf. 267; 12 Am. Dec. 234. So it has frequently been held that the consolidation of two or more railway companies, in pursuance of a statute, operates as a dissolution of the old corporations and the merger of the franchises and privileges of each of them into the new corporation: *Shields v. Ohio*, 95 U. S. 319; *Green Co. v. Conness*, 109 U. S. 104; *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 587; *Keokuk etc. R. R. Co. v. Missouri*, 152 U. S. 301. It is certainly within the power of a legislature which creates a corporation and grants franchises to it to authorize it to sell or mortgage those franchises: *Willamette Mfg. Co. v. Bank of British Columbia*, 119 U. S. <sup>312</sup> 191. Here the franchises were mortgaged by express legislative authority, and hence were transferred through the foreclosure and sale pursuant to law.

Besides, the statute in this state declares, in effect, that any person or association of persons which shall have or may hereafter become the owner or assignee of the rights, powers, privileges, and franchises of any corporation created or organized by or under any law of this state, by purchase under a mortgage sale, sale in bankrupt proceedings, or sale under any judgment, order, decree, or proceedings in any court in this state, including the courts of the United States sitting herein, "may, at any time within two years after such purchase or assignment," organize anew, as provided by the statutes, and shall thereupon have the same rights, privileges, and franchises which such corporation had, or was entitled to have, at the time of such purchase and sale, and such as are provided by the statutes applicable thereto: Rev. Stats., sec. 1788. That section is, in effect, the same as chapter 115 of the Laws of 1872. The Milwaukee & St. Paul Railroad Company became such purchaser, and so organized anew, within two years after such purchase and assignment, although about five years prior to that enactment. The manifest intention of the act was to ratify and confirm all such prior transfers, and to accept all such prior surrenders of corporate rights. The two years mentioned was merely to limit the time within which any purchasers or assignees, subsequently to the enactment, might so organize anew.

After careful consideration, we are constrained to hold, upon the showings made, that, prior to the commencement of this action, the Milwaukee & Minnesota Railroad Company had voluntarily surrendered all of its corporate franchises, and that the same had been accepted by the state.

After the dissolution of a corporation, the power to proceed judicially against it in an action is wholly divested, <sup>218</sup> except as specially authorized by statute. "A defunct corporation, like a natural person who dies, cannot be brought into court by process served upon persons who were officers or agents when the corporation was in existence": Waterman on Corporations, sec. 434. "Where, during the pendency of a suit, a corporation surrenders its charter, which is accepted by the legislature, it becomes defunct, and the suit abates, unless the legislature, by some act, saves the right of action against the corporation": *Greeley v. Smith*, 3 Story, 657. In *Mumma v. Potomac Co.*, 8 Pet. 281, it was held that "there is no pretense to say that a scire facias can be maintained and a judgment had thereon against a dead

corporation, any more than against a dead man." In that case the attorneys of record for the corporation at the time of the rendition of the original judgment appeared and suggested the death of the corporation after the rendition of such judgment, and alleged the same by way of a plea in abatement. The facts being admitted, the trial court gave judgment that the plaintiff take nothing by his writ of scire facias, and that judgment was affirmed by the supreme court of the United States.

From the very nature of things, the dissolution or death of a corporation defendant, like the death of a party to a pending action, can only be brought to the attention of the court by some one other than the defunct corporation. This is obvious from the authorities cited: See, also, *Welch v. Ste. Genevieve*, 1 Dill. 130; *National Bank v. Colby*, 21 Wall. 609, 611, 614; *State v. Jefferson Iron Co.*, 60 Tex. 312. We think it was competent for Dwight W. Keyes, who had been the secretary of the defunct corporation, to intervene and inform the court of the facts which had worked a dissolution and death of the corporation.

By the COURT. The order of the circuit court is reversed, and the cause is remanded with direction to set aside the order of publication and the service of the summons; but, <sup>314</sup> as indicated in *Mumma v. Potomac Co.*, 8 Pet. 281, as there is no such corporation *in esse* as the Milwaukee & Minnesota Railroad Company, there can be no costs awarded in its favor.

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**CORPORATIONS—RESIDENCE.**—A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty: Note to *Simmons v. Norfolk etc. Steamboat Co.*, 37 Am. St. Rep. 617.

**CORPORATIONS—NONUSER—DISSOLUTION.**—The mere fact that a corporation has been without officers or organization, and has performed no corporate acts during a number of years, does not put an end to its franchises, though this may be a good ground for declaring them forfeited by judicial proceedings: *Higgins v. Downward*, 8 Honst. 227; 40 Am. St. Rep. 141, and note. See, also, the extended note to *State v. Atchison etc. R. R. Co.*, 8 Am. St. Rep. 190.

**JUDGMENTS AGAINST DISSOLVED CORPORATIONS—VALIDITY.**—The rigid doctrine of the common law was that the dissolution of a corporation totally extinguished all debts due to or from it, so far, at least, as any right of action was concerned; hence the corporation could not, after such dissolution, either sue or be sued: Extended note to *May v. State Bank*, 40 Am. Dec. 733. See, also, the extended note to *State Bank v. State*, 12 Am. Dec. 242.

## IN RE WEBB.

[80 WISCONSIN, 354.]

**JUDGMENT IN CRIMINAL CASES, SUSPENDING EXECUTION OF.**—A court cannot suspend the execution of its sentence pronounced in a criminal case, except as an incident to the review of the case upon writ of error, or upon other well-established legal grounds. Therefore, if it does by its order, after sentencing the accused to imprisonment for a term specified, purport to suspend such imprisonment until the further order of the court, it cannot, after the expiration of the term specified, direct his imprisonment, though during such term he was at liberty, and suffered no imprisonment whatever.

*T. L. Cleary*, for the petitioner.

*L. K. Luse and the attorney general, and E. M. Lowry*, dissenting attorney of Grant county, for the state.

**355** **PINNEY, J.** The petitioner was convicted of the crime of adultery in the circuit court for Grant county, and on the sixteenth day of March, 1894, at the request of the attorneys for the state and for the defendant, he was sentenced to pay a fine of two hundred dollars, and to pay the costs of the prosecution, taxed at four hundred dollars, and stand committed to the common jail of the county until such fine and costs were paid, the period of imprisonment to be limited to six months; and in case said costs were paid that day, the court directed "that the sentence of imprisonment be suspended until the further order of the court." The defendant paid the costs accordingly. At a succeeding term, October 12, 1894, the defendant being present in court with his counsel, the court made an order reciting the sentence; that the fine had not been paid; and "that there is good reason why further leniency should not be extended to the defendant, but that he should be required to fully comply with said sentence, or be committed to the common jail until said fine is paid"; ordering and adjudging **356** that the defendant "do forthwith pay said fine of two hundred dollars, and that he stand committed to the county jail of the county until said fine is paid, the period of imprisonment being limited in accordance with said sentence to the period of six months." A commitment was issued accordingly, under which the defendant was confined in the county jail. These facts appearing by the return of the sheriff to the writ of habeas corpus, the petitioner demurred to the return.

No legal reason appears to have existed to warrant the



court in suspending its sentence, in whole or in part, after it had been pronounced, if it be conceded the court had such power. The action of the court seems to have been founded on the joint request of the prosecution and of the defendant, and to have been granted as a matter of leniency to the defendant. While it may be said that the defendant is in no position to complain or take advantage of the clemency of the court, the question at issue is one of power, involving serious considerations of public policy respecting the administration of criminal justice. After the defendant had been convicted, and the sentence of the law in legal and proper form had been pronounced against him, it is difficult to understand upon what principle the court could further interfere in the premises. The right of the court, for cause, within the exercise of a reasonable discretion, to postpone sentence or suspend sentence, as it is said, seems to be clear; but we think, both upon principle and authority, its right to suspend the execution of the sentence after it has been pronounced cannot be sustained, except as incident to a review of the case upon a writ of error, or upon other well-established legal grounds. After sentence given the matter within these limits would seem to be wholly within the hands of the executive officers of the law. The sole power is vested in the governor "to grant reprieves, commutations, and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such conditions and with <sup>357</sup> such restrictions and limitations as he may think proper": Const., art. 5, sec. 6. And the action of the court in the premises, after it had regularly pronounced the punishment provided by law for the offense in question, is clearly obnoxious to the objection that it is an attempted exercise of power, not judicial, but vested in the executive. When the sentence was pronounced the defendant was in custody; and it became *eo instanti* his duty to pay his fine, and, for failure to do so, the term of his imprisonment at once began. It had fully expired before the order of October 12, 1894, was made, under which he had been committed and is now held in confinement. The sentence had been in part complied with, and the attempted withdrawal indefinitely of the remainder was, we think, without legal warrant and void.

In the case of *State v. Grottkau*, 73 Wis. 589, 9 Am. St. Rep. 816, before execution of a sentence of imprisonment for one year a stay of execution was granted pending a writ of

error; and, after affirmance of the judgment, it was held that the sentence could be rightly enforced, although the year had in the mean time expired. The stay was for a legal cause: *Reinez v. State*, 51 Wis. 152. The case of *People v. Court of Sessions*, 141 N. Y. 288, was not a case where execution of a sentence had been suspended, but where sentence had been postponed; and the power of the court to delay sentence in its discretion was sustained, and numerous authorities were cited to support it. But the present case involves different considerations. Here the execution of a sentence already pronounced is indefinitely suspended, and it may be the pleasure of the court never to direct execution, so that the suspension has the practical effect of a pardon, or of arrest of judgment indeterminate or final, without the authority of law; and it has been likened to the incorporation into our criminal jurisprudence of the "ticket of leave" system, without any of its safeguards, leaving the <sup>258</sup> convicted criminal subject to the mere option or caprice of the judge, who may direct the enforcement of the sentence after any lapse of time, however great, or withhold it, to the great detriment, it may be, of the interests of the public—a power plainly liable to great abuse.

We think, therefore, that the circuit court had no authority to make the order of October 12, 1894. As already observed, the period of imprisonment, in contemplation of law, commenced March 16, 1894, when the defendant was in custody and failed to pay the fine imposed against him, and he could not be lawfully imprisoned after it had expired. The order of October 12, 1894, was not merely erroneous; in making it the court exceeded its jurisdiction.

The petitioner's demurrer to the respondent's return must be sustained, and he is entitled to be discharged from custody.

By the COURT. It is ordered accordingly.

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CRIMINAL LAW—SUSPENDING SENTENCE.—On conviction of maintaining a nuisance the court suspended sentence, on payment of costs, so long as the defendant should abate the nuisance. At a subsequent term the court imposed sentence of imprisonment and payment of costs, and such latter act was declared void: *State v. Addy*, 43 N. J. L. 113; 39 Am. Rep. 547, and note.

**BLOCK v. MILWAUKEE STREET RAILWAY COMPANY.**

[99 WISCONSIN, 371.]

**EVIDENCE.**—A PHYSICIAN called upon to attend an injured person may, at his request, be examined as a witness, and permitted to describe his condition, nor is the testimony of the witness as to such condition incompetent, though it was partly acquired from statements made to him as a medical man for the purpose of receiving advice and treatment, if there is no ground for claiming that the doctor's relation to the party injured was other than as a medical adviser, and not for the mere purpose of being a witness.

**EVIDENCE—EXPERT WITNESS.**—A PHYSICIAN is competent to testify that the condition of a person whom he was called upon to attend could have been produced by contact with a wire heavily charged with electricity, and also as to whether in his opinion there was a reasonable probability of an ultimate recovery from such injury.

**ELECTRIC RAILWAYS, DUTY OF TO GUARD TROLLEY WIRES.**—It cannot be said, as a matter of law, that it is the duty of an electric railway to place guard wires over its trolley wires in such a way as to prevent telephone wires, in the event of their falling from any cause, from falling upon and coming in contact with the trolley wire, but it should be left to the jury, under all the facts of the case, to determine whether the method actually used was negligent.

**NEGLIGENCE IS NOT THE PROXIMATE CAUSE OF AN ACCIDENT UNLESS**, under the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is a natural consequence of the negligence.

**AN ELECTRIC RAILWAY CORPORATION IS NOT ANSWERABLE** for an injury resulting from a telephone wire falling and coming in contact with its trolley wire, unless a man of ordinary intelligence and prudence, engaged in operating the street railway in question, ought to have reasonably expected that the telephone wire would be likely to come in contact with its trolley wire at the place in question, and occasion injury to persons lawfully upon the highway crossed by such telephone wire.

**DAMAGES AS FOR PERMANENT INJURIES CANNOT** be allowed unless it is reasonably certain from the evidence that the injury will be permanent. It is not sufficient that there be a reasonable probability that the injury will be permanent and lasting.

*Miller, Noyes & Miller*, for the appellant

*Moritz Wittig and W. J. Turner*, for the respondent.

374 **NEWMAN, J.** Errors are assigned as follows: 1. In the admission of testimony; 2. In denying defendant's motion for a nonsuit, and in refusing to grant a new trial; 3. In refusing to submit to the jury questions proposed by the defendant for special verdict; 4. In the charge to the jury.

The errors complained of in the admission of testimony relate to the testimony of physicians relative to the physical and mental condition of the plaintiff a year and a half after

the accident. The accident happened in February, 1892. In August, 1893, the plaintiff became the patient of Dr. Becker. The doctor was permitted to describe the condition in which <sup>375</sup> he found him, giving both subjective and objective symptoms. So far as this related to the seriousness of the injury this was competent. Nor was it liable to the objection that it was hearsay. So far as the knowledge of plaintiff's condition was derived from plaintiff's statements to him as a medical man, for the purpose of receiving advice and treatment, the testimony was not incompetent for that reason: *Quaife v. Chicago etc. Ry. Co.*, 48 Wis. 513; 33 Am. Rep. 821; *Davidson v. Cornell*, 132 N. Y. 228. There is no just ground for claiming that the doctor's relation to the plaintiff was other than as a medical adviser, and not for the purpose of being a witness upon the trial. So the question is not within the principle of *Stewart v. Everts*, 76 Wis. 35; 20 Am. St. Rep. 17; and *Abbot v. Heath*, 84 Wis. 314.

It is also claimed as error that Dr. Becker was permitted to testify that plaintiff's condition as he found it could have been produced by contact with a wire heavily charged with electricity. The plaintiff's theory was that such was the cause of his condition. There was some testimony tending to establish that theory. Surely, testimony showing that such a cause was sufficient to produce such a condition tended also to establish that theory. The testimony was both relevant and competent. The doctor was permitted to give his opinion of the "reasonable probability" of the plaintiff's ultimate recovery from his injuries. While it is true that the whole testimony must establish in the minds of the jury more than a mere "reasonable probability," and must amount to proof to a "reasonable certainty," this ultimate fact is susceptible of proof by items of testimony which do not separately fully establish it. The phrase "reasonable probability" is equivocal. It was for the jury to give force to the doctor's testimony in accordance with the intention of the words used, rather than with a strict or technical definition of the words. This was not error. The witness Eggert, who was present at the time of the accident, testified that he received a shock. This was probably competent <sup>376</sup> as tending to show that the wire was charged with electricity, and so as bearing upon the question whether the plaintiff's injuries were caused by an electric shock.

The negligence which is alleged and claimed against the

defendant is its omission to place guard wires over its trolley wires in such a way as to prevent the telephone wires, in case of their falling from any cause, from falling upon and coming in contact with the trolley wires. It is claimed that the defendant owes the duty to the public to guard it from the effect of accidents which may happen to the telephone wire, which it neither owns nor controls. The employment of electricity to propel cars along railway tracks in cities is of recent institution. It may well be that the dangers attending its use in that function, and the best mode of guarding against accident in its use, are not yet fully known and understood. Many of the phenomena and possibilities of the danger attendant upon such use are still subjects of question and experiment. But notwithstanding this condition of imperfect knowledge, the law permits this mysterious and dangerous power to be used for locomotion in the streets of cities. It is lawfully there. No doubt it is the duty of the defendant to use such customary and approved appliances as are known and used in the business of operating electric railways. So far as reasonable knowledge, in the present state of the science and the practical use of electricity as a motive power for street railways, and reasonable foresight, can go it is bound to guard the public against the perils attendant upon this use of electricity. But it is liable only for what is known as reasonable care. The present state of the science, and the present practical knowledge of the most practical and effectual means and methods of guarding against such perils as are incident to its use, are a most important element in the question of what is reasonable care. In the present condition of the science and of the practical knowledge on this subject, it <sup>377</sup> cannot be said, as matter of law, what method of guarding the wires shall be required, nor whether any guards shall be required; for it is not known to the law that any method now known will prove effective. But it is a question for the jury, under all the facts in the case, to determine whether the method actually used was negligent. The trial court treated this question as one of law. He instructed the jury, in effect, that guard wires placed over the trolley wires is the approved method of protecting the telephone wire in such places, and refused to submit to the jury, in the special verdict, the following question proposed by the defendant: "Did the defendant, in the construction and operation of the street railway in question, exercise such care and prudence

for the safety of persons using the highway as men of ordinary intelligence and prudence engaged in operating the railway in question would have exercised at the place in question?" The instruction virtually took the question of the defendant's negligence from the jury. The refusal to submit the question asked withdrew it altogether from the jury. The question of the defendant's negligence is always for the jury, unless the negligence is so clear upon the evidence that intelligent minds cannot fairly form different conclusions upon it. This question was a proper one to be submitted in a special verdict. It related to a material issue of fact, and one upon which the case in a large measure turned. Both the charge upon this point and the refusal to submit this question were error. This is in no way inconsistent with what was decided in *State v. Janesville St. Ry. Co.*, 87 Wis. 72; 41 Am. St. Rep. 23. That case was on demurrer to the complaint. The action was mandamus to compel the railway company to put guard wires above its trolley wires at crossings. An ordinance of the city required it. The complaint alleged the ordinance, and that guard wires are the proper and approved method of preventing danger from the falling of the telephone wires upon the trolley <sup>378</sup> wires. These facts were admitted by the demurrer. The case in no way involved the decision of the question whether guard wires are the proper method, or whether it is negligence to omit the guard wires.

It is claimed that plaintiff's accident was caused directly by contact with a telephone wire belonging to the telephone company, and neither owned nor controlled by the defendant, and in a street to which its system did not extend. More remotely, it is supposed to have been caused by the falling of the telephone wire upon the trolley wires, which became a live wire by such contact. There would be no claim against the defendant unless it could be shown that the telephone wire was alive with electricity communicated to it by the trolley wires. The defendant may be liable for the result if its omission to guard its wires was negligence, and if that negligence was the proximate cause of the plaintiff's damages. The real first cause of the accident is in doubt. The real test of the defendant's liability for the plaintiff's accident is whether the omission to guard its wire, that being found by the jury to be negligence, was the proximate cause of the accident. The negligence is not the proximate cause

of the accident unless, under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence: *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141, 163; 50 Am. Rep. 352; *Barton v. Pepin County Agr. Soc.*, 83 Wis. 19. This, too, is always a question for the jury where the evidence is not clear, or the proper inference from undisputed evidence may be in doubt. The defendant asked to have this question submitted in the special verdict. This was refused, and no instruction was given relating to this element in the question of proximate cause. The defendant's proposed question was as follows: "Ought men of ordinary intelligence and <sup>379</sup> prudence, engaged in operating the street railway in question, to have reasonably expected that the telephone wire in question would be likely to come in contact with its trolley wire at the place in question, and occasion injury to persons lawfully using the highway crossed by said telephone wire?" The refusal to submit this question, in a proper case, has been held by this court to be error: *Atkinson v. Goodrich Transp. Co.*, 60 Wis. 141; 50 Am. Rep. 352. These two special questions, which the trial court refused to submit, cover the whole question of the defendant's liability. Was the defendant negligent? Was the negligence the (proximate) cause of the damages? These are material issuable facts, such as a party has the right, under the statute, to require to be submitted in a special verdict. They should have been submitted, at least in substance.

The charge of the trial court was long and copious. It contained a long and able disquisition upon the subject of the uses and purposes of highways and of the rights of travelers to free and unobstructed passage therein. He said: "The public have the right to the free and unmolested and unobstructed use of the streets, and no person has the right to hinder and prevent the use of the streets for the purpose of travel," and much more to the same purpose. It would be all very well in a case where questions of that nature were involved. But in this case it tended really to keep out of sight and obscure the real point in controversy. Both the telephone company and the defendant had a perfect legal right to have their wires over the streets. They were no illegal obstruction of the streets. The point involved in re-

lation to them depended on entirely different considerations. It was whether the defendant was negligent in permitting the telephone wire to fall upon its wires. This part of the charge went upon a mistaken theory of the case, and was very likely to mislead the jury by distracting attention from the point of stress in the case.

<sup>380</sup> Relating to the amount of the damages to which the plaintiff might be entitled, and as affected by the permanency of the plaintiff's injuries, the court charged: "I instruct you, gentlemen, that you cannot take into consideration, as an element of damages, any testimony on the subject of the permanency of the injuries, unless you find from the testimony that there is reasonable probability that the injury that he has sustained, and the suffering and disability he is now under, will be permanent and lasting." The criticism is on the phrase "reasonable probability." Because the phrase is equivocal it is liable to communicate to the jury an erroneous impression that some degree of proof less than of reasonable certainty may be sufficient. It is settled in this court that the degree of proof must amount to reasonable certainty: *White v. Milwaukee City R. R. Co.*, 61 Wis. 536; 50 Am. Rep. 154; *Hardy v. Milwaukee St. Ry. Co.*, 89 Wis. 183. The defendant asked for a special instruction to the effect that damages as for permanent injury should not be allowed unless the jury could say from the evidence that it was reasonably certain that the injury would be permanent, and that reasonable probability was not sufficient. This the court refused to give.

The instruction given was erroneous, and it was error to refuse the instruction requested.

For the errors mentioned the judgment must be reversed.

By the COURT. The judgment of the superior court of Milwaukee county is reversed and the cause remanded for a new trial.

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WITNESSES—PHYSICIANS AND SURGEONS—PRIVILEGED COMMUNICATIONS. In an action to recover for personal injury statements made by plaintiff to his physician when first seen by him, as to his symptoms, the locality and character of the pain of which he was complaining, as having been produced by an injury, without reference to its cause or manner of occurrence, are admissible: *Birmingham etc. Ry. Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748, and note. In *Springer v. Byram*, 137 Ind. 18, 45 Am. St. Rep. 159, it was held that communications made by a patient to his physician for the purpose of professional aid and advice are privileged, and that



this immunity extended to all facts, whether learned directly from the patient or acquired by the physician through his own observation or examination. This question is fully treated in the monographic note to *Thompson v. Ish*, 17 Am. St. Rep. 565.

**WITNESSES—EXPERTS—PHYSICIANS AND SURGEONS.**—The opinion of a medical witness having knowledge of the case as to the probability of the plaintiff's recovery is admissible in evidence in an action for damages for personal injuries received by plaintiff from defendant's negligence: *Griswold v. New York etc. R. R. Co.*, 115 N. Y. 61; 12 Am. St. Rep. 775, and note; *Louisville etc. Ry. Co. v. Wright*, 115 Ind. 378; 7 Am. St. Rep. 432, and note.

**NEGLIGENCE—ELECTRIC WIRES IN STREETS.**—Electric corporations permitted to use the public streets for their own purposes must be required to exercise the utmost degree of care in the construction, inspection, and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances: *Haynes v. Raleigh Gas Co.*, 114 N. C. 203; 41 Am. St. Rep. 786, and note.

**NEGLIGENCE—PROXIMATE CAUSE—WHAT IS.**—Proximate cause is one which, in actual sequence, undisturbed by any independent cause, produces the result complained of: *Behling v. Southwest etc. Pipe Lines*, 160 Pa. St. 359; 40 Am. St. Rep. 724, and note; *Western Railway v. Mutch*, 97 Ala. 194; 38 Am. St. Rep. 179, and note. Proximate cause is the efficient cause—the one that necessarily sets the other causes in operation; *Pennsylvania Co. v. Congdon*, 134 Ind. 226; 39 Am. St. Rep. 251, and see also the extensive note to *Gilson v. Delaware etc. Canal Co.*, 36 Am. St. Rep. 807.

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## ROSE v. KIMBERLY.

[89 WISCONSIN, 544.]

**A CONTRACT OPPOSED TO THE PUBLIC POLICY AND LAWS of this state will not be enforced by its courts.**

**INSURANCE BY FOREIGN CORPORATION, WHEN FORBIDDEN.**—If a statute declares that no foreign insurance company shall directly or indirectly take any risks or transact any business of insurance in this state until it has complied with the requirements of such statute, a contract insuring property in this state made by such a corporation in the state of its creation will not support an action in this state to recover an assessment made against the insured.

**ACTION** by the receiver of the Consolidated Mutual Fire Insurance Company, an Illinois corporation, to recover upon an assessment made against the defendants as policy holders. The corporation had never complied with the laws of the state of Wisconsin. The trial court was of the opinion that, notwithstanding such noncompliance, the policies issued by the corporation were valid contracts, and would support an action to recover assessments thereupon. From a judgment entered in favor of the plaintiff the defendants appealed.

*Eaton & Weed*, for the appellant.

*M. C. Phillips*, for the respondent.

549 WINSLOW, J. The insurance contracts in question were made outside of this state upon property within the state, by a foreign company which had not complied with the laws of Wisconsin, and was thus debarred from doing business within the state. The question arising is not whether these contracts can be enforced in the courts of Illinois, where they were made. It might well be that, were this action pending before an Illinois court, the contracts being Illinois contracts, and there being nothing in the statutes or policy of that state prohibiting them, they would be held valid and binding. Such, in substance, was the ruling of this court in the case of *Seamans v. Knapp-Stout etc. Co.*, 89 Wis. 171, ante, p. 825, where a contract made in Wisconsin insuring property in Missouri by a Wisconsin insurance company, which had no license to transact business in Missouri, was upheld. But it is obvious that that decision does not reach or control this case. The question here presented is whether the courts of this state will enforce a contract plainly and squarely opposed to the public policy and laws of the state.

Doubtless, the general rule of law is that a contract valid where made is valid everywhere, but this rule is not without exception. The provisions of our statutes which prescribe the conditions upon which alone foreign insurance companies may do business within this state are very stringent and sweeping: Sanborn and Berryman's Annotated Statutes, secs 1915-1919. They 550 provide, in substance, that no foreign fire insurance company shall, directly or indirectly, take risks or transact any business of insurance in this state, except upon compliance with certain specified requirements. It is unnecessary to state what these requirements are in detail, but it is sufficient to say that they include, among other things, the filing of verified statements showing investments of capital in certain specified securities and to certain amounts, or, in lieu thereof, a deposit with the state treasurer of a certain amount of United States bonds; also, the payment of certain license fees, and the filing of various documents intended for the benefit and protection of policy holders within the state; and only upon compliance with all these requirements is the commissioner of insurance authorized to issue the license which authorizes the doing of business

within this state. The object of this statute is so plain that it cannot be mistaken. It is to protect our citizens against irresponsible and worthless foreign companies of the very kind which we have now before us. The evil to be corrected is not the writing of a policy by an unlicensed company within this state alone, but the writing of such a policy at all. Bearing in mind the object of the statute and the evil to be corrected, it is very plain that the object will be largely defeated, and the evil will flourish as before, if it be held that companies without license can establish their agencies just outside of the state line, and conduct their business by mail.

Now, it will be observed that the legislature was not content with providing that no unlicensed company should make a contract of insurance within this state, but provided that no such company should, directly or indirectly, take risks or transact any business of insurance in this state. The writing of a policy of insurance upon property situated within this state would seem pretty clearly to be, in some degree at least, the transaction of insurance business in this <sup>551</sup> state, whether the policy be written just within or just without the state line.

It was said in *Stanhilber v. Mutual Mill Ins. Co.*, 76 Wis. 285, 291: "A contract insuring property in this state necessarily involves the doing of business in this state, and hence is subject to the laws of this state." We regard the remark as entirely correct, and fully as applicable to the present case as to the *Stanhilber* case. It is not meant by this that the legislation in question has extraterritorial effect, or that it will invalidate a contract made in Illinois, but simply that when that contract is a contract insuring property within this state it is against the policy of our law, and will not be enforced by the courts of Wisconsin, unless the conditions prescribed by our laws have been complied with. In no other way can the manifest purpose and intent of the statute be reached; any different construction would render the law of little effect.

These views necessitate reversal of the judgment.

By the Court. Judgment reversed, and action remanded with directions to enter judgment for the defendant in accordance with this opinion.

**INSURANCE BY FOREIGN CORPORATIONS—VALIDITY OF POLICY.**—Insurance corporations may, in the states wherein they are created, insure property situate in another state by whose laws they are forbidden to do business therein, whereas if the contract of insurance was entered into in the latter state, it would be void: *Seamans v. Knapp-Stout etc. Co.*, 89 Wis. 171; *ante*, p. 825, and note.

**CONTRACTS AGAINST PUBLIC POLICY** are void: *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and note; *Harvey v. Merrell*, 150 Mass. 1; 15 Am. St. Rep. 159; *Duval v. Wellman*, 124 N. Y. 156; *Johnson v. Richmond etc. R. R. Co.*, 86 Va. 975. See the extended note to *Parsons v. Trask*, 66 Am. Dec. 505, for instances of contracts contrary to public policy and therefore void.

## CHLOUPEK v. PEROTKA.

[89 WISCONSIN, 551.]

**ESTOPPEL.**—BY ACCEPTING A CONVEYANCE AS A SUBSTITUTE FOR AND A CORRECTION OF a prior conveyance, the grantee and his heirs are estopped from claiming title under such prior conveyance as to lands not included in the substitute conveyance.

**PRACTICE.**—ONE DISCLAIMING THAT evidence of possession offered by him is for the purpose of proving title is bound by the disclaimer, and is not entitled to a charge to the effect that the property has been adversely held by him.

**EASEMENTS.**—AN ACTION OF TRESPASS FOR INJURY OR DISTURBANCE in the enjoyment of an easement of a right of way over premises cannot be maintained.

ACTION of trespass for breaking and entering upon a strip of land one rod in width on the east side of the southeast quarter of the northwest quarter of section 15. In support of his title the plaintiff offered in evidence a conveyance made in November, 1855, to Anton Chloupek, and including the premises in controversy. A subsequent deed was made in December, 1861, by the same grantor to Chloupek in which the property was described by metes and bounds, and stated to contain six and a quarter acres, and to include and embrace the five acres conveyed by the grantor to the grantee by the former deed, "which five acres were embraced in this deed for the purpose of a more convenient and definite description, the whole quantity of land described in this deed having been surveyed by P. Brennan, late county surveyor." The plaintiffs succeeded to all the title of the grantee Chloupek, while the defendants held conveyances from Chloupek's grantor, and it appeared that the premises in controversy, while they were included in the description in the first deed received by Chloupek from the common grantor, were ex-

cluded from the description in the second conveyance. Judgment for the defendant; the plaintiff appealed.

*J. S. Anderson*, for the appellant.

*Nash & Nash*, for the respondent.

<sup>555</sup> PINNEY, J. 1. The plaintiff's claim of title is under and in privity with that of his grantor and ancestor, Anton Chloupek; and if the execution and acceptance of a substitute deed, December 4, 1861, operated to estop Anton Chloupek and those claiming under him from asserting title under the deed of November 10, 1855, from Krajnik and wife, to more of the premises therein described than is included in the substitute deed, then it is clear that the plaintiff failed to show title to the *locus in quo*, and judgment was rightly given, as will be seen, for the defendant. Undoubtedly, the first deed from Krajnik and wife to Anton Chloupek operated to convey to him in fee all the lands described in it, and the legal title, it may be admitted, remained in him until it descended on his death to his heirs at law; but he and they may be estopped from asserting title to any of it not embraced in the substitute deed, as against Krajnik and his subsequent grantees, immediate and remote. The grantee in a deed poll, by accepting it, becomes bound by its terms as <sup>556</sup> completely and absolutely as the grantor, and it will operate as an estoppel against him by reason of its acceptance, as fully as against his grantor: *Lowber v. Connit*, 36 Wis. 176; *Hutchinson v. Chicago etc. Ry. Co.*, 37 Wis. 582; *Hubbard v. Marshall*, 50 Wis. 327; *Orthwein v. Thomas*, 127 Ill. 554; 11 Am. St. Rep. 159; *Bowman v. Griffith*, 35 Neb. 361. The case of *Hutchinson v. Chicago etc. Ry. Co.*, 41 Wis. 541, shows that there is no valid reason why a corrected conveyance from the grantor "should not have the same effect as though the correction had been made by the judgment of a court of equity instead of the voluntary act of the parties interested." In *Emeric v. Alvarado*, 64 Cal. 529, 537, where the grantees in deeds of specific lands by metes and bounds accepted a conveyance of an undivided interest in a tract of land, which in terms declared that it was in lieu of the previous deeds conveying such specific portions of the same land, it was held that the grantees were estopped from claiming under the previous deeds, upon the ground that they could not hold under the lieu deed and against it, too; that they could not blow hot and cold, or assume inconsistent positions; and that whether

they were divested of whatever title was conveyed by the original deeds without a reconveyance was immaterial. This is according to the maxim, "*Allegans contraria non est audiendus*": Broom's Legal Maxims, 129. Anton Chloupek affirmed the transaction as stated in the second or substitute deed in the most solemn manner, by conveying to the plaintiff, his son, the land therein described according to the express description of that deed. The latter obtained no title except through this deed, which did not include the *locus in qua*, unless he obtained it as heir at law and by the quitclaim deed from the other heirs of Anton Chloupek, dated October 28, 1892; but the heirs of Anton Chloupek came into the position or condition of their ancestor, and were concluded by the same estoppel that bound him. The second or substitute deed appears to have been intended as <sup>557</sup> a revision or correction of the former one, and to have been designed to embrace in it all the lands Krajnik intended to convey. It is immaterial that the legal title to the premises in question may have descended to the heirs of Anton Chloupek, if the second deed operates by way of estoppel, as we think it does, to prevent them from asserting title to any part of the premises described in the deed of November 10, 1855, not included in the second deed of December 4, 1861.

2. The plaintiff, in making out his case, gave evidence to show the possession and use of the strip of land constituting the *locus in quo* by Anton Chloupek and by those claiming under him, insisting upon his right to do so on the ground that he had alleged both title and possession as a basis of recovery, and the defendant insisted that evidence to prove title by adverse user or prescription was inadmissible. The plaintiff's counsel then stated: "We are not proving title. We are proving possession—that is all—under a grant. We found our claim on a grant." The court suggested that possession would be presumed to follow the legal title until the contrary was shown; whereupon the plaintiff's counsel stated he would rest, and bring in that testimony in rebuttal. The defendant did not go into the question of possession at all, and the case was closed without other proof on that subject. The evidence produced on the part of the plaintiff tended to show that the strip of land in dispute was used as a roadway, and that the plaintiff and his father had used and claimed it as such; that they claimed a right of way over it. The first request of the plaintiff was not that the court should find

that the plaintiff or his ancestor had ever adversely held the premises, but that they had had the actual, sole, exclusive, and notorious possession thereof. If such possession was not adverse it would not establish such a right as would entitle him to recover in this action. The second request was to find that the land had been adversely held, occupied, and used as a road to obtain access to other <sup>558</sup> lands of the plaintiff. We think that these requests were properly refused, and that the plaintiff was rightly regarded as concluded by his disclaimer, and that he could not maintain trespass for injury to or disturbance in the enjoyment of an easement over the premises in question, if he had such: Washburn on Easements, 4th ed., 738; *Baer v. Martin*, 8 Blackf. 317; *Smith v. Wiggin*, 48 N. H. 105. Nor is the case of *Joice v. Conlin*, 72 Wis. 607, in conflict with this conclusion. In that case it was held only that one sued in trespass for removing obstructions from a right of way could defend on the ground that they interfered with his enjoyment of the same.

Judgment was rightly given for the defendant.

By the COURT. The judgment of the circuit court is affirmed.

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**ESTOPPEL BY DEED.**—A grantee may fortify his title by a subsequent deed from his grantor to the premises originally conveyed, and is not estopped from claiming that the title passed by the prior conveyance if by so doing he does not prejudice the rights of others: *Thompson v. Thompson*, 19 Me. 235; 36 Am. Dec. 751.

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## **McKINNEY v. GERMAN MUTUAL FIRE INSURANCE SOCIETY.**

[89 WISCONSIN, 432.]

**INSURANCE, FORFEITURE OF.**—THE PLACING OF A STOVEPIPE THROUGH THE ROOF of an insured dwelling avoids the policy, if it declares that no dwelling-house shall be taken as a risk unless provided with good and sufficient brick or stone chimneys, and that the insurer excludes as risks any and all buildings which have in use stovepipes passing through the roofs thereof.

**INSURANCE, WAIVER OF FORFEITURE.**—If a stovepipe is used on insured premises in a manner forbidden and made a cause of forfeiture by a policy, but assessments are made and paid on a premium note after knowledge by the agents of the assured of the cause of forfeiture, it is thereby waived.

**ACTION** against the defendant, a town mutual insurance society. Among the conditions contained in the policy sued

upon by the plaintiff was the following: "No dwelling-house, of whatever kind, shall be taken as a risk or insured by the German Mutual Fire Insurance Society of Liberty, Grant county, Wisconsin, if said building shall not be provided with good and sufficient brick or stone chimneys. The society hereby exclude as risks any and all buildings which have or may have in use stovepipes passing through the roof of such building or its additions. Any person or persons who is or may be insured in said society, and who violates the provisions of these amendments, thereby annuls and cancels his or their policy of insurance issued by said society." After the policy had been issued, an agent of the defendant visited the premises and there found a stovepipe in use in violation, and informed the insured that such use of the stovepipe rendered his policy void. Nevertheless, subsequent assessments were made by the defendant upon the premium note given to it by the plaintiff, and were by him paid a considerable time before he suffered the loss for which he sought indemnity in the present action. Judgment for the plaintiff and the defendant appealed.

*Bushnell, Watkins & Moses, for the appellant.*

*Clark & Taylor, for the respondent.*

<sup>657</sup> **CASSODAY, J.** The defendant is justified in contending that the use of the stovepipe contrary to the provisions of the policy, as found, avoided the policy: *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, and cases there cited. The more important question is whether the defendant is in a position to make such contention available. It is not found, and does not appear, that the secretary, Bald, knew that the stovepipe was being used at the time he inspected the premises and issued the policy. But the court found, in effect, as undisputed, that the secretary who succeeded him, Kemper, was upon the premises in the summer of 1890; that he then <sup>658</sup> observed that the kitchen was in use; that he then told the plaintiff that the use of the stove, with no stone or brick chimney, would avoid the policy; that afterward, and before the fire, the defendant made two assessments upon the premium note given by the plaintiff upon the said dwelling-house and its contents, amounting to four dollars and twenty-two cents, which the plaintiff paid. True, it is not found by the court or jury that Kemper, or any official of the company, knew that the stove and pipe were so in use at the time such



assessments were made and paid, but Kemper testified in behalf of the defendant to the effect that he was on the premises July 3, 1890; that he then saw there was a stove used in there, and the stovepipe running up through the roof, as mentioned; that he guessed they were using the stove about that time; that he told the plaintiff that such use would annul the policy; that the plaintiff told him afterward, and before the fire, that it was used two or three months in the year; that he told the plaintiff that such use of the stovepipe would annul the policy; that since then the defendant had levied two assessments on the plaintiff, and he had paid the same. It further appears that the plaintiff paid an assessment of four dollars and sixteen cents November 18, 1891, and three dollars and six cents December 16, 1892. Such evidence is undisputed. The making and collecting of those assessments by the defendant, with knowledge of the forfeiture, was a waiver of the same, and certainly estops the defendant from now taking advantage of such forfeiture: *Dohlantry v. Blue Mounds etc. Ins. Co.*, 83 Wis. 181; *True v. Bankers' etc. Assn.*, 78 Wis. 287; *Jerdee v. Cottage Grove etc. Ins. Co.*, 75 Wis. 345; *Renier v. Dwelling House Ins. Co.*, 74 Wis. 89.

By the COURT. The judgment of the circuit court is affirmed.

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**INSURANCE—VIOLATION OF CONDITION IN POLICY—FORFEITURE.**—A fire insurance policy containing a provision forbidding the keeping or use of gasoline on the insured premises is rendered void by the violation of such condition by one in the occupancy of the insured premises with the implied consent of the owner: *German etc. Ins. Co. v. Board of Commrs.*, 54 Kan. 732; 45 Am. St. Rep. 306. The use on insured premises of an engine regularly employed in grinding bark in a tannery in the process of tanning leather is not ground for forfeiting an insurance policy releasing the company from liability for loss by fire resulting from the use of "any steam-engine temporarily employed for the purpose of threshing out crops of any kind": *Schaeffer v. Farmers' etc. Ins. Co.*, 80 Md. 563; 45 Am. St. Rep. 361, and note.

**INSURANCE—FIRE—WAIVER OF FORFEITURE BY ACCEPTANCE OF PREMIUM.**—When an insurance company, after notice or knowledge of the breach of a condition in the policy, makes and collects assessments under the policy upon the insured, a forfeiture is thereby waived: *Elliott v. Lycoming County etc. Ins. Co.*, 66 Pa. St. 22; 5 Am. Rep. 323. A forfeiture of a policy of insurance for breach of warranty is not waived by a subsequent assessment upon the forfeited policy and the payment by the insured of the assessment: *Diehl v. Adams County etc. Ins. Co.*, 58 Pa. St. 443; 98 Am. Dec. 302, and note. See, also, the notes to *Farnum v. Phoenix Ins. Co.*, 17 Am. St. Rep. 247, and *Grubbs v. North Carolina etc. Ins. Co.*, 23 Am. St. Rep. 70.

## VAN OSDELL v. CHAMPION.

[89 WISCONSIN, 661.]

**EXECUTION, WITHDRAWING PROPERTY FROM.—A CONDITION IN AN ABSOLUTE DEVISE OF PROPERTY** that it shall never be subject to any liability, attachment, judgment, or execution against the devisee is void.

APPLICATION of certain judgment creditors of Charles B. Champion to have paid to them the proceeds of certain real property which had been sold under a judgment in a partition suit. His interest in the property had been acquired by him by a devise thereof from his mother which purported to be upon "the express condition that the share of my said son, Charles B. Champion, shall in no wise ever be subject to any debt, liability, execution, attachment, or judgment against said Charles B. Champion existing at this time or at any time hereafter." The trial court decided that this condition was ineffective, and directed that the application of the judgment creditors be granted.

*Wilson & Martin and Calvert Spansley*, for the appellants.

*W. E. Carter*, for the respondents. .

665 PINNEY, J. It is laid down as a general rule that "a condition, annexed to a conveyance in fee or by devise, that the purchaser or devisee should not alien, is unlawful and void. . . . If the grant be upon the condition that the grantee shall not commit waste, or not take the profits, or his wife not have her dower, or the husband his curtesy, the condition is repugnant and void, for these rights are inseparable from the estate in fee." "Conditions are not sustained when they are repugnant to the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience": 4 Kent's Commentaries, \*131; 2 Redfield on Wills, 287, 290. But it has been held that land may be conveyed to a married woman so as to exclude her husband upon her death from becoming tenant of the premises by the curtesy: *Haight v. Hall*, 74 Wis. 152; 17 Am. St. Rep. 122. The authorities are very generally agreed that property cannot be conveyed, devised, or bequeathed with a restriction against it or any portion of it going to assignees in bankruptcy or in any form to creditors, although a grant may be made which shall be determinable by way of cesser, or by limitation of the estate

over to another upon the occurrence of a certain event, such as insolvency, bankruptcy, or the occurrence of any other act or event arising or growing out of the conduct or neglect of the grantee or devisee. The bounty of a grantor or testator may, however, be secured to another by means of a trust, a "spendthrift's," as it is sometimes called; so that the periodical income of the estate cannot be anticipated by the *cestui que trust*, but may be paid to him from time to time, beyond the power of creditors to intercept or reach it. Many such cases are collated and cited by appellants' counsel, some of which are referred ~~see~~ to in *Nichols v. Eaton*, 91 U. S. 717, 727; and the whole subject is fully considered in *Broadway Nat. Bank v. Adams*, 133 Mass. 170; 43 Am. Rep. 504; and *Foster v. Foster*, 133 Mass. 179.

But these cases are all clearly distinguishable from the present, by reason of the absolute and unlimited condition contained in the residuary clause of Mrs. Champion's will, under which her son, Charles B. Champion, obtained his title. We have not been referred to, nor are we aware of, any authority that would warrant us in upholding, as against the creditors of Charles B. Champion, the provision by which the devise to him was upon the express condition that the premises should "in nowise ever be subject to any debt, liability, execution, or attachment against him, existing at this time or at any time hereafter." The condition is general, and is not limited to future events. It was intended to affect existing as well as future writs or judgments, and is unlimited in point of time, and was manifestly an attempt to secure the estate in his hands as a devisee in fee against the claims of creditors incident to such an ownership by the laws of every civilized state; and to sustain such a condition would be productive of great inconvenience to creditors and those dealing with the grantee or devisee upon the faith of apparent absolute ownership, and would be contrary to sound public policy. To give effect to such a condition would be, as to such transaction, to permit parties to abrogate and annul the law of the state by a mere private arrangement; and the contention of the appellants' counsel goes to the extent of claiming that a man may thus be the full legal, as well as the equitable, owner of property thus devised, deal with it as he pleases, and that it shall not be liable for his debts. This would be to destroy, in a very great degree, all faith in the apparent ownership of property, and countenance secret ex-

emptions from liability of a debtor's property for his debts, and would tend to mischievous and fraudulent results.

¶ In *Blackstone Bank v. Davis*, 21 Pick. 42, 32 Am. Dec. 241, it was held that a provision in a devise of land that the land should not "be subject or liable to conveyance or attachment" was void, because contrary to law, which makes a man's property liable for the payment of his debts. In that case, as in this, the condition was unlimited in point of time; and it was declared to be "an attempt to impose a restraint upon property which the law would not allow." In *Bramhall v. Ferris*, 14 N. Y. 44, 67 Am. Dec. 113, while sustaining the provision there in question, it was said that "any attempt to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory, . . . would clearly be repugnant to the estate in fact devised and bequeathed, and would be ineffectual for that reason, as well as upon the policy of the law." This view is sustained in *Hahn v. Hutchinson*, 159 Pa. St. 133, 138-141; *Stansbury v. Hubner*, 73 Md. 229; 25 Am. St. Rep. 584; *Steib v. Whitehead*, 111 Ill. 251; *McCormick etc. Co. v. Gates*, 75 Iowa, 343; *Ehrisman v. Sener*, 162 Pa. St. 577. We hold, therefore, that the provision in the will of Mrs. Champion, relied on to protect the property devised to Charles B. Champion from the claims of his judgment creditors, is void.

¶ We find no error in the judgment appealed from.

By the COURT.—The judgment of the circuit court is affirmed.

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**DEVISE—VALIDITY OF CONDITION EXEMPTING PROPERTY FROM EXECUTION.**—A condition annexed to a devise of land, that it shall not be "subject to conveyance or attachment," is void; *Blackstone Bank v. Davis*, 21 Pick. 42; 32 Am. Dec. 241, and note. Tangible property is always subject to the owner's or beneficiary's debts, and by the use of no terms or art can property be given to a man so that he may continue to enjoy it or derive any benefit from it, and at the same time defy his creditors and deny them satisfaction thereout: *Mebane v. Mebane*, 4 Ired. Eq. 131; 44 Am. Dec. 102, and note. This subject is treated at length in the note to *De Peyster v. Michael*, 57 Am. Dec. 492. And see, also, the extended note to *Garland v. Garland*, 24 Am. St. Rep. 638, and section 189 a of Freeman on Executions.

**CASES**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**ILLINOIS.**

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**GALBRAITH v. TRACY.**

[153 ILLINOIS, 54.]

**PARTNERSHIP—SURVIVING PARTNER AS TRUSTEE.**—The fiduciary relation of trustee and *cestui que trust* exists between the surviving partner and the representatives of a deceased partner.

**PARTNERSHIP—ADMINISTRATOR OF SURVIVING PARTNER AS TRUSTEE.**—The administrator of the last surviving partner is charged with the duty of completing the settlement of the firm estate as a trustee of the legal representatives of the partner first deceased.

**PARTNERSHIP REAL ESTATE IS REGARDED IN EQUITY AS PERSONALTY,** no matter in whom the legal title is vested. The remainder of it, after partnership debts are all discharged, is held in common by the heirs, subject to dower, or goes to the devisees.

**PARTNERSHIP—PURCHASE BY ADMINISTRATOR.**—An administrator of a surviving partner who purchases certificates of purchase of partnership land sold under foreclosure at an inadequate price holds as trustee for the representatives of the deceased partners, though the firm funds in his hands are not sufficient to redeem all the land.

**TRUSTEES ARE NOT ALLOWED TO PLACE THEMSELVES IN A POSITION** in which it is difficult for them to be honest to their trust.

**EQUITY.**—A PARTY SEEKING IN EQUITY TO DIVEST OTHERS OF THE LEGAL TITLE to land may be required to repay advances for the purchase and improvement of the land.

*E. U. Overman, and Sharp & Berry Bros., for the appellants.*

*Kirkpatrick & Alexander, for the appellees.*

•• **BAKER, J.** For a number of years Jesse Kemp and John J. Kemp carried on the business of raising and dealing in livestock in partnership. The stock, machinery, implements, and other personal property employed in such business were partnership property. The 400 acres of land on

which the business was conducted stood in their joint and joined names, and was presumably purchased for the purposes of the partnership business, and seems to have been used and regarded by them as partnership property. When John J. Kemp died, Jesse Kemp, the surviving partner, became a trustee in respect to the property and assets of the late partnership. In equity a surviving partner is treated as a trustee, with the fiduciary relation of trustee and *cestuis que trust* existing between him and the representatives of the deceased partner. There is a conflict in the authorities upon this point, but in this state the law is as stated: *Nelson v. Hayner*, 66 Ill. 487; 17 Am. & Eng. Ency. of Law, 1154, 1155, and cases cited in notes.

Jesse Kemp, the surviving partner, filed in the county court an inventory of the real and personal estate of the late partnership, under oath, and in it was a schedule of the lands here in question. Then Jesse Kemp died, and Franklin Galbraith became administrator of his estate, and assumed and undertook the administration of the trust in respect to the partnership property. Among other things he reported to the county court that there <sup>was</sup> "property in his hands of the late firm of John J. & Jesse Kemp, of which partnership said Jesse Kemp was the survivor," and he applied for and obtained an order for the sale of all the personal property contained in the inventory and appraisement bill, stating it was the property "of said late firm," and he realized from the sale thus made the sum of \$1,341.12.

In the event of the death of both the partners before the settlement of the partnership affairs, the administrator of the last survivor stands in the shoes of his intestate, and he is charged with the duty of completing the settlement as a trustee, the relation between him and the legal representatives of the partner first deceased being that of trustee and *cestuis que trust*: *Dayton v. Bartlett*, 88 Ohio St. 357; *Thomson v. Thomson*, 1 Bradf. 24; *Brooks v. Brooks*, 12 Heisk. 12; 17 Am. & Eng. Ency. of Law, 1158. In equity the real estate of a partnership is regarded as, and stands on the same footing with, personal property, no matter in whom the legal title may be vested: *Bopp v. Fox*, 63 Ill. 540; *Simpson v. Leech*, 86 Ill. 286; *Trowbridge v. Cross*, 117 Ill. 109; *Alkire v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540. But whatever remains of it after the partnership debts shall have been dis-

charged is held in common by the heirs, subject to dower, or goes to the devisees: *Strong v. Lord*, 107 Ill. 25.

It is urged that Franklin Galbraith, administrator of Jesse Kemp, took no interest in the lands, only a power to sell them for the payment of debts, and that, therefore, no duty devolved upon him to redeem the lands from the sales made by the master in chancery, and that after the expiration of the time allowed by law for the redemption of the lands to the widows and children of Jesse Kemp and John J. Kemp, if not before, he had the right to purchase the certificates of sale or buy the lands. This claim is inconsistent with the position he occupied as trustee in respect to the partnership property. Besides <sup>as</sup> this, it was expressly held in *McCreehy v. Mier*, 64 Ill. 495, that an administrator is not a stranger, in all respects, to the real estate of his intestate; that it is, under some circumstances, his duty to redeem from a sheriff's sale, and that under the facts of that case he became trustee for the heirs. The case was quite like the case at bar. The administrator procured an assignment of the certificate of purchase to be made to his brother. This court said: "It is plain that the same principle which forbids him to become a purchaser at a sale under order of court must forbid him to buy, on his own account, a certificate of purchase given by the sheriff or master on a sale made in the lifetime of the deceased."

It is urged that only \$1,341.12 came to the hands of Franklin Galbraith, the administrator, in money, and that such sum was wholly insufficient to redeem from the \$3,000 mortgage the two \$500 mortgages, and pay the claims against the estate, and costs and expenses of administration. The 160 acres in section 34 sold for \$1,241. The other four tracts were sold separately, one for \$1,780, one for \$324, one for \$670, and one for \$1,340, and, in order to redeem one tract, it was not necessary to redeem all. The total sum called for by the five certificates of purchase was \$4,907.69. Deducting therefrom the \$1,341.12 in money would leave only \$3,566.57, plus interest to time of redemption, to be arranged for in order to redeem all the land from the mortgage sales. The lands were worth from \$12,000 to \$14,000, a value more than three times, and almost four times, the amount of the required sum. It is almost certain that Galbraith, with the business and financial ability that this record indicates that he possessed, could readily have arranged, through the unsecured

creditors or otherwise, to save the whole or some portion of the 400 acres of land to the two widows and their children, if he had felt so inclined. As for the widows and children, they had no money or means or business capacity.

<sup>63</sup> Even if it should be said that the record does not justify these surmises and conclusions, yet that would make no difference in the decision of this case. A trustee is not allowed to put himself in a position in which to be honest must be a strain on him: *Staats v. Bergen*, 17 N. J. Eq. 554; *Tyler v. Sanborn*, 128 Ill. 136; 15 Am. St. Rep. 97. The very next day after the right of the widows and heirs to redeem from the sales under the \$3,000 mortgage had expired the trustee purchased the four certificates of purchase from Moir, and immediately upon the expiration of the statutory fifteen months he received a deed from the master in chancery, and at once took possession of the 240 acres of land. In the county court he waived process and entered his appearance, and raised no objections, and allowed judgments to be entered on the Moir and Peterson claims. Then Moir and Peterson redeemed the 160 acres in section 34 from Priscilla Trimmer, and, there being no bid over and above the redemption money, they forthwith received a deed from the sheriff. That deed bears date December 5, 1885, and nine days thereafter, on December 14, 1885, they conveyed to Galbraith, the trustee, he paying them the amount of the redemption money and the amounts of their respective claims against the Kemps. As matter of course, this whole thing was pre-arranged. It cannot, in reason, be deemed otherwise.

We forbear to enter into any discussion of the evidence tending to prove that Galbraith and others took steps to prevent any competition at the sale made by the sheriff, and other like matters. Thus Galbraith, the trustee, got the whole of the lands at just half of their then actual value. It is unnecessary to consider much, if any, of the oral testimony that was taken at the hearing, other than that in regard to values. The quiet records of the county and circuit courts, and those that rest in the recorder's office, though they are dumb, yet they speak, and they establish the cases of the complainants in the two cross-bills.

<sup>64</sup> It is urged in behalf of the cross-errors assigned that there is no evidence in the record upon which the heirs of John J. Kemp can be bound, showing a partnership interest in the lands; that Galbraith, at least so far as relates to the



160 acres in section 34, "was in no way connected with the widow and heirs of John J. Kemp, or with his estate," and that therefore the circuit court erred in directing an account to be taken of any sum or sums of money that Galbraith may properly have laid out or expended for or on account of the respective undivided halves of said lands. We think that the evidence sufficiently establishes that the 400 acres of land were partnership lands, and we do not see upon what theory the equities of the widow and children of John J. Kemp can be worked out, in respect to the whole of the 400 acres, as against the title of appellants, other than on the theory that Franklin Galbraith, as administrator of Jesse Kemp, the surviving partner of John J. Kemp, stood in a fiduciary relationship to the widow and heirs of said John J. Kemp in respect to such land. How, otherwise, can they have any relief whatever in respect to the 240 acres? Counsel, in their brief, say: "So far, then, as any partnership property or liabilities were concerned, Galbraith represented the interests of both partners; hence occupied the same relative position to the one set of heirs as he did to the other. By his obligation as administrator of the estate of the survivor he was bound to care for the interests of all." And they make use of numerous other like arguments and expressions. It is not admissible that one should blow both hot and cold with reference to the same transactions. *Allegans contraria non est audiendus*.

Where parties seek, in a court of equity, to divest others of a legal title to land, the court may impose equitable terms on which relief will be granted, and if it appears that the parties divested have advanced money for the purchase and improvement of the property, the court, in its decree finding it to belong to the parties making <sup>65</sup> claim to the land, may properly require the money so advanced to be refunded, with legal interest: *St. Patrick's Catholic Church v. Daly*, 116 Ill. 76. The decree of the circuit court in that behalf, and in regard to all other matters, does justice and equity between the parties.

The decree is in all things affirmed.

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**PARTNERSHIP—SURVIVING PARTNER AS TRUSTEE.**—A surviving partner of a firm of attorneys is a trustee, and cannot be permitted to make a gain for himself at the expense of the estate of the deceased partner: *Little v. Caldwell*, 101 Cal. 553; 40 Am. St. Rep. 89. See the extended note to *Shields v. Fuller*, 65 Am. Dec. 297.

PARTNERSHIP REAL ESTATE is, in equity and for partnership purposes, to be treated as personality: *Rossleky v. Brown*, 92 Ala. 522; 25 Am. St. Rep. 83, and note; *Bates v. Babcock*, 95 Cal. 479; 29 Am. St. Rep. 133, and note; *Duncan v. Duncan*, 93 Ky. 37; 40 Am. St. Rep. 159.

## SUMMERS v. HIBBARD.

[158 ILLINOIS, 102.]

**CONTRACTS—PURCHASE BY LETTER.**—An absolute offer by letter to purchase goods, accepted by letter in the same manner, forms an absolute and unconditional contract.

**CONTRACTS—PURCHASE BY LETTER.**—**PRINTED MATTER** on a letter head forms no part of the letter written thereon, and does not qualify an absolute contract of purchase arising from an offer contained in such letter.

**CONTRACTS PARTLY WRITTEN AND PARTLY PRINTED** are controlled by the written part, in case the parts are apparently inconsistent, or there is reasonable doubt upon the sense or meaning of the whole.

**CONTRACTS—DUTY TO PERFORM.**—If a party by his positive contract creates a duty or charge upon himself, he becomes an insurer, and must make his contract good, either by performance or the payment of damages, and inevitable accident affords him no relief.

**CONTRACTS TO MANUFACTURE—DUTY TO PERFORM.**—The performance of an absolute contract to sell and deliver at a certain time goods to be manufactured by the seller is not excused by the breakage of the machinery of his manufactory.

**CONTRACT TO MANUFACTURE—POSTPONEMENT OF DELIVERY—MEASURE OF DAMAGES.**—If the delivery of goods due under a contract for their manufacture is postponed by agreement, the measure of damages for non-delivery is the difference between the contract price and the market price at the time the goods are deliverable under the contract to postpone. If the time of delivery is postponed indefinitely by agreement, the measure of damages for failure to deliver is the difference between the contract price and the market value at a reasonable time after demanding performance.

**CONTRACT TO MANUFACTURE—FAILURE TO PERFORM—MEASURE OF DAMAGES.**—If a vendor in a contract to manufacture and deliver goods at a given time fails to perform his agreement, the vendee may recover the difference between the contract price and the market price, without purchasing the goods elsewhere.

**EVIDENCE.—STATEMENTS MADE BY AN AGENT** are admissible in evidence only when they form part of the *res gestæ*, and are made *dam foret opus*.

*L. D. Thoman*, for the appellants.

*Hamline, Scott & Lord*, for the appellees.

<sup>108</sup> **BAKER, J.** It is insisted by appellants that the words, "All sales subject to strikes and accidents," printed at the top of their letter heads, must be considered in determining

what the contract was, and that said words constituted an express condition that became a part of the contract between them and appellees. We do not so understand the case. Under date of March 1, 1889, appellees invited appellants to make them an offer of sale of a specified quantity of sheet-iron, to be delivered in certain designated months. On March 4th appellants made them an offer, as requested. On March 9th, in their letter of that date, appellees declined to accept the offer received, and at the same time they submitted for consideration an offer of their own—an offer of purchase. This offer contained all the elements and terms of a precise and complete contract, and lacked only the assent thereto of the persons to whom it was addressed to make it such a contract. The offer was to buy a certain quantity of sheet-iron, of certain sizes, to be delivered in Chicago in specified quantities and at designated times, and to pay therefor certain prices at certain stated times, and appellees concluded their proposal by saying: "If you accept our offer you may enter us for March shipment 250 bundles," etc. The offer was absolute and positive, and without any condition, qualifications, or exceptions whatever. On March 11th appellants wrote to appellees: "Your favor of March 9, at hand. We accept your offer." And they thereupon proceeded to restate in their letter the terms of the proposal made to them. These two letters made the contract between the parties. The two preceding letters seem to us to be wholly immaterial. The mere fact that appellants <sup>100</sup> wrote their acceptance on a blank form for letters, at the top of which were printed the words, "All sales subject to strikes and accidents," no more made those words a part of the contract than they made the other words there printed, "Summers Bros. & Co., Manufacturers of Box-annealed Common and Refined Sheet-Iron," a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letter heads would not have the effect of preventing appellants from entering into an unconditional contract of sale.

In *American Express Co. v. Pinckney*, 29 Ill. 392, this court said: "In a case where the agreement is partly written and in part printed, the preference is always given to the written part." In that case the printed matter was in the body of

the instrument, incorporated and mingled with the written matter. It would seem there is more reason and occasion for applying the principle of law there invoked in a case, where, as here, the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written. *People v. Dulaney*, 96 Ill. 503, is to the same effect as the case above cited.

When an instrument is in part written and in part printed, and these parts are apparently inconsistent, or there is a reasonable doubt upon the sense and meaning of the whole, the words in writing will control, because they are the immediate language and terms selected by the parties themselves for the expression of their meaning: *Alsager v. St. Catherine's Dock Co.*, 14 Mees. & W. 796, and *Robertson v. French*, 4 East, 130; both cases cited with approval in *American Express Co. v. Pinckney*, 29 Ill. 392. In the case at bar it is inconsistent that the contract should be both an absolute contract and a conditional contract. The terms <sup>110</sup> of payment in this contract were sixty days' time, or two per cent discount for cash in ten days. Suppose the words, "All sales not paid for on delivery to draw interest," had been printed on the letter head; can there be any doubt that the written terms would have controlled the printed words? Here there was a written provision that the iron was to be delivered free on board the cars at Chicago. Suppose it had been printed on the letter head that the manufacturers would not be responsible for iron after a delivery to a common carrier; would not the written provision have governed the contract?

Upon the whole, we are inclined to the opinion that the mere fact that the words in question were printed in the caption of the paper on which appellants wrote their unqualified acceptance of the contract proposed by appellees did not have the effect of reading them into the agreement thereby consummated; and appellants understood that some sort of an agreement was brought to a completion by their act, for in their letter they wrote: "We also enter your order for 250 bundles, etc., March shipment."

Appellants made a further claim that there was an implied condition in the contract that would relieve them from performance if their mill plant, without any fault on their part, was so disabled as to make it impossible for them to make the iron that they contracted to deliver. The contract did

not call for iron manufactured at their mill. It simply called for first-class common sheet-iron of certain specified sizes. There was nothing to prevent their filling the contract by going into the market and buying sheet-iron manufactured at other mills. Appellees seemed to have experienced no difficulty, other than that of being forced to pay a higher price, when they went on the market and bought from other parties the sheet-iron contracted for which appellants failed to supply. But even if the contract had been for sheet-iron of their own manufacture, the breakages in this mill would not have relieved them from liability. The general doctrine <sup>111</sup> is that where parties, by their own contract and positive undertaking, create a duty or charge upon themselves, they must abide by the contract and make the promise good, and either do the act or pay the damages: *Steele v. Buck*, 61 Ill. 343; 14 Am. Rep. 60; *Dehler v. Held*, 50 Ill. 491; *Bunn v. Prather*, 21 Ill. 217. Inevitable accident affords them no relief, for they are regarded as insurers to the extent of making good the loss. There is a principle of the law that, in contracts in which the performance depends on the continued existence of a given or specified person or animal or thing, a condition is implied that the impossibility of performance arising from the perishing of the person, animal, or thing shall excuse the performance. But there is no place in this case for the application of that rule.

There is no doubt of the correctness of the rule stated by appellants, that where delivery is required to be made by installments the measure of damages will be estimated by the value at the time each delivery should be made. In the case at bar appellees made threats to buy in at seller's expense, but excuses rendered and promises made by appellants of frequent and large shipments deterred them from doing so. If delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement, and where the time of delivery is postponed indefinitely, the measure of damages is the difference between the contract price and the market value at a reasonable time after demanding performance. Appellees admit that they had no legal right to buy in, during the month of August, more than three thousand one hundred and fifty-nine bundles of sheet-iron, that being the quantity then due, under the original and additional con-

tracts, on August 1st. But the uncontroverted evidence is, that the price of such iron remained firm during September and a part of October, being at no time lower than August prices. So the premature purchases worked appellants no injury, but were <sup>112</sup> to their benefit. Besides this, it was held, in *Follansbee v. Adams*, 86 Ill. 13, that the vendee may charge the vendor with the difference in prices without making any purchases, the result being the same, and the vendee being entitled to the benefit of his contract.

It is urged that the trial court committed error in that it refused to allow to go to the jury testimony tending to prove that in June, 1889, one Charles, purchasing agent of appellees, made certain admissions to one of the appellants. There was no error in this action of the court. The admission of such testimony would have been in violation of the rule that the terms of a written contract cannot be varied by parol evidence, and also in violation of another rule, that the statements of an agent are admissible only when they are part of the *res gestæ*, and are made *dum fervet opus*.

The making of the written contracts being admitted at the trial, the court having construed them, and held that the printed line in the caption of the letters was no part of such contracts, and having resolved, as matter of law, that there was no implied condition in them growing out of their nature, the claimed deficit in the deliveries not being denied, and there being no conflict of testimony in respect to the state of facts upon which the damages were to be based, there remained in the case no question that required submission to the decision of the jury, and it was not manifest error to direct a verdict for the plaintiffs, and instruct the jury at what amount to assess the damages.

Some minor points of objection are raised, but in them we find no reversible error.

The judgment of the appellate court is affirmed.

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CONTRACT BY LETTER.—An acceptance of an offer without objection or condition binds the party accepting, and the party making the offer has the right to understand that the acceptance was according to the terms of the offer: *Drew v. Eimunda*, 60 Vt. 401; 6 Am. St. Rep. 122. If the correspondence between the parties contains all the details of a contract, it is enforceable, though they intended that their agreement should be formally expressed in a single paper: *Sanders v. Pottlitzer etc. Fruit Co.*, 144 N. Y. 209; 43 Am. St. Rep. 757. A contract made and accepted by letter sent through the post is completed and takes effect the moment the letter of acceptance is deposited in the postoffice. The acceptance, however, must

be an absolute, and not a conditional, one: *Hartford etc. Ins. Co. v. Lasher Stocking Co.*, 66 Vt. 439; 44 Am. St. Rep. 859, and note.

**CONTRACTS PARTLY WRITTEN AND PARTLY PRINTED—CONSTRUCTION.**—While a written provision of a contract should prevail over one inconsistent with it, and which is part of a printed form adopted for general use, yet only so far as it is apparent that the parties intended to modify or disregard the printed stipulations will the latter give way: *Frost's etc. Lumber Works v. Millers' etc. Ins. Co.*, 37 Minn. 300; 5 Am. St. Rep. 846; *Goicoechea v. Louisiana etc. Ins. Co.*, 6 Mart. N. S., 51; 17 Am. Dec. 175.

**CONTRACTS—DUTY TO PERFORM.**—If one contracts to do a thing which is possible in itself, the promisor is liable for a breach thereof, notwithstanding it is beyond his power to perform it: *Anderson v. May*, 50 Minn. 230; 36 Am. St. Rep. 642, and note.

**DAMAGES.**—Loss of profits arising out of delays in furnishing machinery under contracts therefor: See the note to *Van Winkle v. Wilkins*, 12 Am. St. Rep. 303, where the cases are collected.

**AGENCY.**—**STATEMENTS OF AN AGENT, TO BE ADMISSIBLE IN EVIDENCE,** must have been made by him at the time of the transaction, either while he was actually engaged in its performance or so soon thereafter as to be a part of it: *Phelps v. James*, 86 Iowa, 393; 41 Am. St. Rep. 497, and note; *Plymouth County Bank v. Gilman*, 3 S. Dak. 170; 44 Am. St. Rep. 782; *Empire Mill Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272, and note; *Sidney etc. Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494; 9 Am. St. Rep. 124, and note.

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## PLATT v. ÆTNA INSURANCE COMPANY.

[153 ILLINOIS, 112.]

**INSURANCE—ARBITRATION AS WAIVER OF RIGHT TO REBUILD.**—A written submission of an insured fire loss to arbitration, providing that such arbitration shall not affect the rights of either party, except as to the actual amount of the loss, does not waive the insurer's reserved right to rebuild.

**INSURANCE—WAIVER OF RIGHT TO REBUILD.**—An unconditional refusal by an insurer to rebuild a fire loss made before arbitration, with a promise to pay an award when made, is a waiver of the right to rebuild, and is final and conclusive upon the insurer, without a new consideration, although the insurer subsequently, within the thirty days allowed for an election, gives the insured notice that he will rebuild.

**INSURANCE—PAROL WAIVER OF RIGHT TO REBUILD** an insured structure destroyed by fire may be shown, notwithstanding a written submission of the question of actual loss to arbitration.

*Morrison & Whitlock*, for the appellant.

*E. P. Kirby*, for the appellee.

116 CARTER, J. The errors assigned on this record bring in question, 1. The sufficiency of the plea to sustain the judgment of the circuit court rendered in bar of plaintiff's action;

and 2. The ruling of that court in sustaining defendant's demurrer to plaintiff's replications to said plea.

The substance of the plea is, that after the submission and award mentioned in the declaration, and within the thirty days provided in the policy, the defendant gave written notice to the plaintiff of its intention to rebuild, and undertook to rebuild, and was prevented by the plaintiff. The provisions in the policy affecting the question are: "Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and in case differences shall arise touching the amount of any loss or damage, it shall be submitted to the judgment of arbitrators, mutually chosen, whose award, in writing, shall be binding on the parties. In case of loss on or damage to the property insured, it shall be optional with the company to replace lost or damaged goods with others of the same kind and equal goodness, and to rebuild or repair the building or buildings (a reasonable deduction being allowed for the increased value <sup>117</sup> of new in replacing old materials), within a reasonable time, giving notice of their intention so to do within thirty days after preliminary proofs shall have been received at the office of the company." The written submission to arbitration, which is also set out in the declaration, after providing that the appraisal of the arbitrators "as to the amount of loss or damage shall be binding on both parties," concludes: "It being understood that this appraisal is without reference to any other question or matters of difference within the terms and conditions of the insurance, and is of binding effect only so far as regards the actual cash value of or damage to such property," etc.

Plaintiff insists that the plea is insufficient, for the reason that the submission to and award by the arbitrators amounted to an election by defendant to pay, and a consequent waiver of its right to rebuild; that the arbitration, under the policy, had much to do with the question of payment—in fixing the amount—but nothing with the question of rebuilding. But it is a sufficient answer to say that the parties themselves have, by their written submission, excluded from its effect every question which might arise under the policy, except the actual amount of the loss. In other words, they have expressly provided that the submission to arbitration should not affect the rights of either party, except as to the actual amount of the loss. How, then, can plaintiff claim that the



defendant, by the written submission, waived its right to rebuild, when, by the very terms of the agreement, such waiver is provided against? So, in considering the question whether the plea states any defense, it is not necessary to construe this provision of the policy, since the parties have themselves construed it. Even if the proper construction of the policy were as contended by plaintiff, the court could not say that by the arbitration defendant had waived its right to rebuild, when the parties have effectually provided that it should not have <sup>118</sup> that effect. It necessarily follows that the plea presented a sufficient defense.

But a different question is presented by the replications. By them the plaintiff undertook to avoid the defense set up in the plea, by replying, in substance, in different forms, that the defendant had, before the submission to arbitration, elected to pay, and had waived its right to rebuild. To the first, second, third, and fourth replications we regard the demurrer as well taken, and as the fifth and sixth contain all the material averments of the first four, we need to consider only the questions arising on the demurrer to replications five and six.

That these replications contain immaterial averments, in setting up the payment of expenses of arbitration and the furnishing by plaintiff of plans and specifications, as insisted by counsel for defendant, is certainly true, for it could be no reply to the plea to say that plaintiff did any of those things which, under the terms of the policy, it was his duty to do. But regarding these averments as mere surplusage, the question arises whether or not there is not sufficient matter alleged in these replications, taken as true under the demurrer, to make a complete reply to the defense set up in the plea. They allege, in substance, that before the arbitration defendant waived its right to rebuild, in this, to wit, that plaintiff requested defendant to rebuild the house, and defendant unconditionally and absolutely refused to rebuild, demanded the arbitration, and stated to plaintiff that it would pay the amount of the award when made. It may be said that these replications contain, at most, mere argumentative averments of an election by defendant to pay the loss in money when ascertained, and a consequent waiver of its right to rebuild; but as the demurrer was general, only, it is sufficient if the replications are good in substance. By the terms of the policy defendant had, for the thirty days mentioned in the

policy, the right of choice between two alternatives. If it elected <sup>119</sup> to rebuild, it must give notice to that effect at any time within the thirty days; if it did not so elect, it was its duty, under the policy, to pay the loss within sixty days after its ascertainment. This right of choice was reserved for the benefit of the company itself, and implied, of course, the right to choose either course, at its own election, within the prescribed time, as might appear to be most to its advantage. While, as we have seen, the submission to arbitration did not, of itself, amount to an election, no reason is perceived why the company could not make its election aside from and independently of the arbitration. Nor was it necessary to wait until the expiration of the thirty days, nor until the amount of loss was ascertained by arbitration. It was entirely optional with the company. No new contract was required, and consequently no new consideration necessary to make its choice valid. It would be presumed that in making its choice it would take the course of greatest advantage to itself: Bishop on Contracts, secs. 96, 806.

The contention by counsel for defendant that its refusal to plaintiff to rebuild and its promise to pay, as set up in the replications, would not be binding on the company, and that such a promise was a mere *nudum pactum*, is not tenable. In order that the defendant might make a valid election under this policy, it was not necessary for plaintiff to do any thing, to give any thing, or to suffer any thing. It is true that if defendant, by words or acts, had led plaintiff reasonably to understand that it had elected to pay, and plaintiff had acted on such understanding, and thereby placed himself in a position where he would be prejudiced by the company's then electing to rebuild, the company would, on the doctrine of estoppel, be held to have waived its right, and to be precluded, from its election, to rebuild: *Williamsburg City Fire Ins. Co. v. Cary*, 83 Ill. 453. But we do not understand that such is the only method by which a waiver may be shown, notwithstanding it may be the most common <sup>120</sup> one. The election of one of the alternatives is, of itself, a waiver of the other. Bishop, in his work on Contracts, section 779, says, that the doctrine of election applies wherever there is a plurality of rights in the alternative, and that, commonly, it is voluntary. Again (section 783), that beyond the knowledge of the fact necessary to a valid election "there is believed to be no rule possible more definite

than that there must be some distinct language, act, or omission, which, illumined by the special circumstances, plainly indicates the party's choice of the one alternative and waiver of the other." "There must be language or conduct duly expressing or exemplifying the intent": Bishop on Contracts, sec. 803. See, also, 2 Hermann on Estoppel, 1178, note; *West v. Platt*, 127 Mass. 372; *Texas etc. Ry. Co. v. Rust*, 19 Fed. Rep. 245. "When the election is made it will be final, and cannot be reconsidered, even where no injury has been done by the choice or would result from setting it aside": 2 Hermann on Estoppel, 1173, 1196. "Wherever, by law or by contract, a party has laid before him a variety of steps, the taking of one of which excludes another or the rest, he must choose between them. After his choice is made, and by words or by acts expressed in a manner suited to the particular case, he cannot reverse it. He is said to have elected the one step and waived the other": Bishop on Contracts, sec. 808. See, also, 1 Wood on Fire Insurance, 327-332; *Wynkoop v. Niagara Fire Ins. Co.*, 91 N. Y. 478; 43 Am. Rep. 686; *Morrell v. Irving Fire Ins. Co.*, 33 N. Y. 429; 38 Am. Dec. 396; *Beals v. Home Ins. Co.*, 36 N. Y. 522.

Applying these principles to the case at bar, these replications, averring an election by the company to pay and a waiver of its right to rebuild, would, independently of the arbitration, seem to be a sufficient reply to the plea. If the company refused to rebuild and decided to pay, and so notified the insured, the only other party interested, what more could be necessary, in law, to constitute an election of the one alternative and the waiver of <sup>121</sup> the other? Such election, when made, could not be reconsidered, nor the consequent waiver avoided by the company at its pleasure, even though the time limited in the policy for such election had not expired. The company was not bound to take all the time allowed to make its decision, nor did the policy provide that it should have more than the one choice; therefore, assuming the replications to be true, the subsequent decision by the company to rebuild and the notice thereof to the plaintiff, as set up in the plea, were of no effect.

But it is contended by counsel for defendant that all conversations, negotiations, statements, and promises between the parties, prior to or contemporaneous with the execution of the written submission to arbitration, were merged in that instrument, and that parol evidence is not admissible to vary

or contradict it, and therefore the waiver by parol alleged in the replications could not be proved. The rule invoked is a familiar one, but its application is not always free from difficulty. Greenleaf, in his work on Evidence, volume 1, section 284, says that the rule does not apply in cases where the original contract was verbal and entire, and a part only was reduced to writing. This court has also frequently so held: *Ludeke v. Sutherland*, 87 Ill. 481; 29 Am. Rep. 66; *Laflin v. Howe*, 112 Ill. 253. And in *Lane v. Sharpe*, 3 Scam. 566, Mr. Justice Caton said: "It is true that matter collateral to the writing may be proved by parol, but it must not change the terms of the contract, or increase or diminish the liabilities of the parties." This qualification of the rule is aptly expressed in Abbott's Trial Evidence, page 295, thus: "Where it appears that the instrument was not intended to be a complete and final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement on a matter as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect," oral evidence is not excluded. The arbitration, by its terms, was limited to one thing, viz., <sup>123</sup> the ascertainment of the actual cash value of the building destroyed, and it would be unreasonable to say that verbal proof of another distinct and collateral thing could not be made, because it preceded or was contemporaneous with the execution of the writing. Nor would oral proof of the election and waiver set up in the replications in anywise tend to vary, contradict, or enlarge the written instrument. It would not in any degree affect the amount of the loss or the manner of its ascertainment. Besides, to apply the rule contended for, and exclude such oral evidence, would violate the writing itself, which, on its face, excludes from its operation every other question.

And this brings us to the last question raised by plaintiff's counsel which it is considered important to mention. It is insisted that the written submission, by its express terms, excludes the conclusion that the company elected to pay the amount found by the arbitrators. To this construction of the instrument we cannot assent. True, it does, on its face, exclude the conclusion that the company thereby elected to pay; but, as it was "without reference to any other question or matters of difference within the terms and conditions of the insurance, and of binding effect only so far as regards the actual cash value of or damage to the property," it could not

affect any other matter whatever. It left all other questions and matters arising out of the insurance contract just as they would have been had not the written submission been made. As it could not be construed as a waiver on the part of the company of its right to rebuild, neither could it be construed as denying that the company had in some other manner waived such right: *Soars v. Home Ins. Co.*, 140 Mass. 343. If it be true, as alleged in the replications (and on the demurrer it must be taken as true), that the company, by its adjuster, on being requested to rebuild the house destroyed by the fire, refused unconditionally to do so, and stated to the plaintiff that on the amount being ascertained by arbitration it would pay it, <sup>133</sup> the company must be held to have elected to pay the loss and to have waived its right to rebuild.

For the error in sustaining the demurrer to replications five and six, the judgments of the appellate and circuit courts are reversed, and the cause remanded to the circuit court for further proceedings consistent with this opinion.

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INSURANCE—RIGHT TO REBUILD—ELECTION.—WAIVER: See the note to *Insurance Co. v. Hope*, 11 Am. Rep. 51.

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## ROBINSON BANK v. MILLER.

[158 ILLINOIS, 244.]

**PARTNERSHIP REALTY.**—The mere use of land by a firm does not make it partnership property.

**PARTNERSHIP.**—REAL ESTATE IS NOT NECESSARILY THE INDIVIDUAL property of the members of a firm because the title is held by one or by the several members in undivided interests. Whether realty is firm or individual property depends largely upon the intention of the partners.

**PARTNERSHIP.**—REAL ESTATE BOUGHT WITH PARTNERSHIP FUNDS for firm purposes and applied to firm uses, or entered and carried in its accounts as a partnership asset, is deemed in equity to be firm property, no matter in whom the title is vested.

**PARTNERSHIP REALTY—RESULTING TRUST.**—If real estate is bought with partnership funds, the partner holding the legal title holds it subject to a resulting trust in favor of the partnership. In such case no agreement is necessary, and the statute of frauds does not apply.

**PARTNERSHIP REALTY.**—IN THE ABSENCE OF PROOF OF ITS PURCHASE WITH PARTNERSHIP FUNDS for firm purposes, realty standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common.

**PARTNERSHIP REALTY.**—IF THE INTENTION OF PARTNERS TO CONVERT LAND into firm property is to be inferred from circumstances, they must

not admit of any other reasonable and satisfactory explanation, and if such conversion is sought to be shown by agreement of the partners, it must be clear and explicit.

**PARTNERSHIP REALTY.**—If persons, who afterward become partners, buy land in their individual names and with their individual funds, before making the partnership agreement, the land is the individual property of the partners, though used in the firm business, in the absence of a clear and explicit agreement subsequently entered into, or controlling circumstances showing an intention to convert it into firm assets.

**PARTNERSHIP REALTY.—LIEN OF PARTNERS.**—Each member of a partnership has a superior lien on the partnership property for the payment of the firm debts to which it must first be applied.

**PARTNERSHIP REALTY.**—NO DOWER INTEREST CAN EXIST in partnership real estate until the firm debts are paid and its accounts adjusted.

**PARTNERSHIP.**—A MORTGAGEE OF PARTNERSHIP PROPERTY from a partner holding the legal title without notice of its partnership character has a lien superior to partnership debts.

**PARTNERSHIP.**—NOTICE OF PARTNERSHIP IN LAND upon which a partnership business is carried on does not necessarily arise from notice of the partnership business.

**ESTOPPEL IN FACT.**—If one, by his words or conduct, voluntarily causes another to believe in the existence of certain facts, and induces him to act upon that belief so as to change his previous position, the former is estopped to aver a different state of facts.

**DEEDS.**—A GRANTEE OF LAND IS NOT OBLIGED TO PAY A MORTGAGE thereon which constitutes no part of the consideration for the purchase, and was not made in good faith for a *bona fide* indebtedness, although the grantee took a deed expressed to be subject to incumbrances.

*Callaghan, Jones & Lowe, for the appellant.*

*Parker & Crowley, for the appellees.*

352 **MAGRUDER, J.** The Robinson Bank, one of the appellants herein, claims that the mill property, including the four acres of land upon which the mill was located, was partnership property belonging to the firm of Newton, Emmons & Miller; that, as such, it was first liable to be subjected to the payment of the partnership creditors, including the bank; that the mortgagees, Lamport, Walter, and Willis, 352 and Wiley S. Emmons, were individual creditors of Miller and John S. Emmons, and only entitled to such surplus as might arise out of the mill property after the payment therefrom of the firm debts.

Whether real estate upon which a partnership transacts its business is firm property or the property of the individual members of the firm is oftentimes a difficult question to determine, and one upon which the authorities are not altogether uniform.

The mere fact of the use of land by a firm does not make

it partnership property: *Goepper v. Kinsinger*, 39 Ohio St. 429, *Hatchett v. Blanton*, 72 Ala. 423. Nor is real estate necessarily the individual property of the members of a firm because the title is held by one member, or by the several members in undivided interests: 1 Bates on Law of Partnership, sec. 280. Whether real estate is partnership or individual property depends largely upon the intention of the partners. That intention may be expressed in the deed conveying the land, or in the articles of partnership; but, when it is not so expressed, the circumstances usually relied upon to determine the question are the ownership of the funds paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm: 1 Bates on Law of Partnership, sec. 280; 2 Lindley on Partnership, marg. p. 649; 17 Am. & Eng. Ency. of Law, 945, and cases in note.

Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and, in such case, it makes no difference, in a court of equity, whether the title is vested in all the partners as tenants in common, or in one of them, or in a stranger: *Parsons on Partnership*, 4th ed., sec. 265; 1 Bates on Law of Partnership, sec. 281; *Johnson v. Clark*, 18 Kan. 157; 17 Am. & Eng. Ency. of Law, 948, and cases cited. If the real estate is <sup>254</sup> purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application: *Parker v. Bowles*, 57 N. H. 491; 1 Bates on Law of Partnership, sec. 281.

In the case at bar the land was not purchased with partnership funds. The undivided one-third interest bought by John S. Emmons was paid for by him with his own individual money. Miller also paid for the one undivided one-third interest, purchased by him, with his individual funds. None of the money of the firm of Newton, Emmons & Miller was contributed toward the purchase of the one-third interest held by Newton. Indeed, the proof shows that the firm of Newton, Emmons & Miller was formed by an oral agreement after Emmons and Miller had bought their interests. Each partner here held the title to an undivided one-third

part of the property. No entries were made upon the books of the firm showing that the real estate was treated as firm assets. The evidence, however, does show that the property was bought for the purpose of being used in the milling business, and that, after its purchase, it was used for firm purposes, and that the firm gave its notes to pay for repairs, and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners holding as tenants in common?

It cannot be said that the land is firm property upon the theory of a resulting trust, because the money of the firm was not used to buy the property. Such a trust might exist in favor of the firm, regarding it as a person, if the partners had taken the legal title, and the firm had advanced the purchase money. The trust must arise at the time of the execution of the conveyance, and when the title vests in the grantee. Such could not have been the case here under the facts stated: *Van Buskirk v. Van Buskirk*, 148 Ill. 9. In view of the fact that the land was bought with individual, and not partnership, funds, and was conveyed in undivided interests to the several partners, and in the absence of any agreement that it should be regarded as firm property, does the conduct of the parties in afterward forming a partnership, and using the property for partnership purposes, and repairing and improving the mill at the expense of the firm, make the land firm property in a court of equity? A negative answer to this question is found in many of the authorities, as will be seen by reference to the following: *Alexander v. Kimbro*, 49 Miss. 529; *Thenot v. Michel*, 28 La. Ann. 107; *Reynolds v. Ruckman*, 35 Mich. 80; *Parker v. Bowles*, 57 N. H. 491; *Thompson v. Bowman*, 6 Wall. 316; *Frink v. Branch*, 16 Conn. 260; *Wheatly v. Calhoun*, 12 Leigh, 264; 87 Am. Dec. 654; *Sikes v. Work*, 6 Gray, 433; *Gordon v. Gordon*, 49 Mich. 501; *Moody v. Rathburn*, 7 Minn. 89; *Paige v. Paige*, 71 Iowa, 318; 60 Am. Rep. 799; *Parsons on Partnership*, 4th ed., sec. 266; *Hatchett v. Blanton*, 72 Ala. 423. The general doctrine of all these cases is, that a purchase of the land with partnership funds is necessary to make it firm property. *Parsons*, in his work on *Partnership*, fourth edition, sections 265, 266, says: "Although it (real estate) be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership



purposes, it will be considered as held by them as joint tenants, or tenants in common; . . . so, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it." In *Hatchett v. Blanton*, 72 Ala. 423, the supreme court of Alabama says: "Steering clear of all cases of fraud or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership." In *Thompson v. Bowman*, 6 Wall. 316, the supreme court of the <sup>255</sup> United States says: "In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants, or as tenants in common": *Buchan v. Sumner*, 2 Barb. Ch. 165; 47 Am. Dec. 350.

The theory of some of the cases is that real estate, bought with separate, and not partnership, funds, cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lands unless by writing, in view of the statute of frauds, except such as results by implication of law: *Parker v. Bowles*, 57 N. H. 491.

There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm: 1 Bates on Law of Partnership, secs. 281, 282, 285. The use of the property is not conclusive of its character as real estate or personalty, but is only evidence of the intention of the parties. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation: Parsons on Partnership, sec. 267. And where it is sought to show a conversion of the land into personalty by agreement of the partners, such agree-

ment must be clear and explicit: 17 Am. & Eng. Ency. of Law, 954, and cases cited.

In *Alkire v. Kahle*, 123 Ill. 496, 5 Am. St. Rep. 540, land was conveyed during the existence of the partnership to "Cato Abbott and Henry Robinson, composing the firm of Abbott & Robinson," <sup>257</sup> and it was held not to be partnership property, because it was not shown to have been either purchased with partnership funds, or used for partnership purposes; but we do not regard that case as holding that the mere use of the land for partnership purposes constitutes it firm property.

In *Mauck v. Mauck*, 54 Ill. 281, land which had been bought and held for firm purposes was said to be firm property, and to partake of the character of personalty, but in that case a part of the business of the firm was to buy and sell real estate, and, although the land was said to belong to the firm, it does not appear that it was not purchased with partnership funds.

In *Faulds v. Yates*, 57 Ill. 416, 11 Am. Rep. 24, the land was bought for the use of the partnership, but after the partnership was formed and with the money of two of the partners.

In *Bopp v. Fox*, 63 Ill. 540, land bought by four partners with their individual funds, and conveyed to them in their individual names, was held to be partnership property, because, two weeks before the purchase, the four purchasers made, not a mere executory agreement to form a partnership at a future time, but "a present verbal agreement of partnership," and then afterward bought the land and began the erection of a mill for the purpose of carrying on the milling business as a firm "already formed under the verbal agreement." It was there held that the essential question was whether the purchase money "was paid as partnership money for a partnership purpose," and we said: "We consider this was essentially a purchase with partnership funds for partnership purposes."

The weight of authority seems to us to support the position, that, where persons, who afterward become partners, buy land in their individual names, and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to <sup>258</sup> make it firm prop-

erty, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property. The testimony proves affirmatively that there was no agreement, written or verbal, to put the land into the firm as a firm asset, and that it was treated by the parties as individual property. John S. Emmons insured his interest separately. When he gave his note for fifteen hundred dollars, signed by his brother as surety, in part payment of the purchase money for the land, he promised his brother that he would give him a mortgage on his one-third interest, when the master's certificate, issued to him at the sale, should ripen into a deed; and the mortgage afterward made was given as soon as the master's deed was obtained. Four months after the purchase, when he borrowed eighteen hundred dollars of the bank upon his note, signed by his father and father in law as sureties, he stated to the bank that he intended to mortgage his interest to his sureties to secure them. About this time Newton, Emmons & Miller paid five thousand four hundred dollars in cash for improving the mill, but this amount was contributed by the partners, not out of partnership funds, but by the contribution of their individual moneys, each paying one-third. The one-third so paid by John S. Emmons was the eighteen hundred dollars borrowed on his note. The bank itself, in procuring deeds from the partners in September, 1884, dealt with them as owners of separate interests.

Each member of a partnership has a superior lien on the partnership property for the payment of the firm debts. This equitable lien of the partners is worked out for the benefit of the firm creditors: *Hapgood v. Cornwell*, 48 Ill. 64; 95 Am. Dec. 516. Hence partnership property must be first applied to the payment of partnership debts; and the true interest of each partner in such property is the balance found to be due to him after the payment of the firm debts<sup>222</sup> and the settlement of accounts between the partners: *Bopp v. Fox*, 63 Ill. 540. In equity real estate stands on the same footing, in this respect, as personal property: *Alkire v. Kahle*, 123 Ill. 496; 5 Am. St. Rep. 540. It results that there can be no dower interest in real estate owned by a partnership until all the partnership debts are paid and the partnership accounts are adjusted: *Trowbridge v. Cross*, 117

Ill. 109. If the land in controversy was firm property in September, 1884, there were no dower interests at that time in the wives of Newton, Emmons, and Miller, and yet their wives were required by the bank to sign the deeds to its trustee, Woodworth, and one of them was paid two hundred dollars for her signature.

There is no question about the bona fide character of the mortgages to Willis Emmons and Wiley S. Emmons and W. W. Walter. They paid the judgments upon the notes of John S. Emmons, upon which they were sureties, and those notes were given for borrowed money expended in the purchase and improvement of the mill property. We think those mortgages have been properly sustained, as resting upon an undivided one-third interest in the land, which must be regarded, under all the circumstances of this case, as the separate property of John S. Emmons.

But even if the interest held by John S. Emmons was firm property, there is nothing to show that the holders of the mortgages thereon had notice, or reasonable ground for believing, that it was firm property. The record title was in John S. Emmons, and all the circumstances coming to their knowledge, as heretofore stated, were calculated to create the impression that his real interest was that indicated by the record. Facts showing a partnership in the milling and grain business were not necessarily notice of a partnership in the land. Now, it is well settled that a bona fide purchaser or mortgagee of firm property from one of the partners holding the legal title, without notice of its partnership character, will hold it free from partnership claims: Parsons on Partnership, 4th ed., <sup>260</sup> secs. 277, 278; 1 Bates on Law of Partnership, sec. 291; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; Collyer on Partnership, Perkins' ed., sec. 135.

When a firm and its members are insolvent, and the firm has been dissolved, an equity exists in favor of the creditors of the firm in respect of the lands purchased with partnership funds, which is superior to that of the creditors of the individual partners; but there may be cases where an equal or superior equity may be created in favor of a creditor of an individual member of the firm, as where one has furnished to one of the members the capital upon which the business was commenced: *Reeves v. Ayers*, 38 Ill. 418. By signing the note for fifteen hundred dollars as surety, Willis Emmons enabled John S. Emmons to purchase an interest in the mill

property, and, if that interest was a partnership asset, he thereby aided in procuring a part of the firm capital.

In addition to what has been said, we think the evidence shows that the officers of the bank, if they did not actually make an agreement to that effect, gave John S. Emmons to understand that the bank would protect the mortgages on his interest if he and his wife would sign the deed to the bank. The consideration of that deed was just the amount of the two mortgages; and four witnesses swear that one of the officers of the bank promised to take care of the mortgages. When a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as to change his previous position, the former will be estopped to aver against the latter a different state of things: *Casler v. Byers*, 129 Ill. 657.

As to the mortgage made by the appellant Miller to Lamport, the lower courts have found that that mortgage was not made in good faith, and was not given to secure a bona fide indebtedness. It is claimed that the note for five thousand five hundred dollars secured thereby was given for money <sup>261</sup> loaned to Miller by his wife and by his brother in law, Lamport. It is true that the fact of the relationship between the parties is no proof of fraud, although it may be a circumstance to excite suspicion: *Wightman v. Hart*, 37 Ill. 123. But we are not satisfied from the evidence that the money alleged to have belonged to Mrs. Miller was not the money of Miller himself. If any funds were loaned to him by Lamport, it is not possible to fix their exact amount separately from those alleged to have been borrowed of Mrs. Miller. The witnesses contradict each other as to amounts, and as to the times and places of payment. There is refusal to answer questions, and failure to explain matters needing explanation. We have examined all the testimony as contained in the original record, and we cannot say that the circuit court erred in the conclusion reached by it in regard to this mortgage, or that the appellate court has erred in agreeing with the circuit court.

It is true that the deed from Miller and Newton to the bank contains the words "subject to incumbrances," but we think the reference here is to incumbrances which are made in good faith. The facts about the mortgage were not known when the deed was executed. There is some conflict in the

evidence as to whether the parties intended to refer to the Lamport mortgage, or to certain liens claimed to exist in favor of creditors who had furnished machinery for the mill. But even if the words refer to the Lamport mortgage alone, it is not certain from the testimony that the amount of that mortgage was a part of the consideration for the execution of the deed. The grantee in a deed who purchases subject to an incumbrance to secure indebtedness may not be under obligations to pay such indebtedness if its amount is not included in, and does not form a part of, the consideration of the conveyance: *Drury v. Holden*, 121 Ill. 130. The amount named as the consideration in the deed was simply the agreed value of Newton's interest, and did not include <sup>263</sup> any part of this mortgage. The amount of the actual consideration agreed to be paid by the bank for the deed of Miller's interest, to wit: five thousand three hundred and thirty-three dollars and thirty-three cents, one-third of sixteen thousand dollars, was paid by a credit of that amount on the firm indebtedness of twenty-one thousand five hundred and eighty-five dollars and twenty-three cents, due from Newton, Emmons & Miller to the bank.

The judgment of the appellate court and the decree of the circuit court are affirmed.

Mr. Justice PHILLIPS, having heard this case in the appellate court, took no part in its decision in this court.

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**PARTNERSHIP REALTY—WHETHER FIRM OR INDIVIDUAL PROPERTY.**—As between partners, land treated by them as partnership property, especially if purchased and paid for with partnership money, is regarded as firm assets. Whether it is partnership realty is a question of intention: *Collner v. Greig*, 137 Pa. St. 606; 21 Am. St. Rep. 899, and note. If real property is not purchased with partnership funds for partnership purposes, but is, as far as the records show, the separate property of the individual partner, and not incident to the business of the firm, the fact that it is entered on the firm's books and treated as firm property does not make it partnership property; but if it is connected with the partnership business, necessary for the convenient and proper conduct of the business, is treated by the partners as common property, and so entered on the firm books, it is firm property: *Union Nat. Bank v. National Mechanics' Bank*, 80 Md. 371; 45 Am. St. Rep. 350, and note. This subject is fully discussed in the extended notes to *McCormick's Appeal*, 98 Am. Dec. 197-201; *Page v. Thomas*, 54 Am. Rep. 793; and *Greene v. Greene*, 13 Am. Dec. 646.

**DOWER IN PARTNERSHIP LANDS.**—Dower will not be allowed the widow of a deceased partner in lands acquired as partnership property and required to pay the partnership liabilities: *Sumner v. Hampson*, 8 Ohio, 328; 32 Am. Dec. 722; *Dyer v. Clark*, 5 Met. 562; 39 Am. Dec. 697; *Willet v. Brown*, 65

Mo. 138; 27 Am. Rep. 265; *Paige v. Paige*, 71 Iowa, 318; 60 Am. Rep. 792. See, further, the extended note to *Page v. Thomas*, 54 Am. Rep. 793.

**ESTOPPEL IN PARS—WHEN ARISES GENERALLY.**—Estoppel in pars is one that arises from acts, conduct, or declarations of a person by which he designedly induces another to alter his position injuriously to himself: Note to *Union Nat. Bank v. National Mechanics' Bank*, 45 Am. St. Rep. 361.

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## HARMISON v. CITY OF LEWISTOWN.

[153 ILLINOIS, 312.]

**NUISANCES—POWER TO DECLARE.**—Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which, in fact, is clearly not one, but, in doubtful cases depending upon a variety of circumstances requiring judgment and discretion, their action is conclusive.

**NUISANCE—POWER TO DECLARE—SLAUGHTERHOUSE.**—Under a general grant of power over nuisances, town authorities have power to adopt an ordinance declaring a slaughterhouse within town limits a nuisance.

**EVIDENCE.—OBJECTION TO ADMISSION** of evidence of such character that it can be avoided by other proof, to be available on appeal, must be specific, and not general.

**PROCESS—WAIVER OF SERVICE.**—Joinder in an appeal from a judgment is a waiver of any objection to the service of summons in the action in which the judgment is rendered.

**FINES.—PARTY CANNOT COMPLAIN** that a fine assessed against him is less than the minimum provided for by ordinance.

*J. W. Bantz*, for the appellants.

*W. J. Dyckes*, for the appellee.

**315 BAKER, J.** This was a suit brought by the city of Lewistown, incorporated under the general laws of this state, against William H. Harmison and Frank Sheets, to recover a penalty for an alleged violation by them of section 2 of ordinance No. 14 of said city, by keeping and maintaining a slaughterhouse within the corporate limits of said city, contrary to the provisions of such ordinance. The cause was tried before a jury in the Fulton circuit court, and they were found guilty, and adjudged to pay a fine of five dollars and costs. From that judgment they appealed to the appellate court, and from the judgment of affirmance in that court they bring the cause here by this further appeal.

The ordinance in question declares that a slaughterhouse shall be deemed and considered a public nuisance, and provides that any one who shall erect or maintain a slaughterhouse within the limits of the city shall, upon conviction, be

fined not less than five nor more than fifty <sup>316</sup> dollars. The principal contention of appellants is, that the city council had no power to enact the ordinance in question.

Paragraph 75 of section 62, chapter 24, of the Revised Statutes of 1874, provides that the city council in cities, and the president and board of trustees in villages, incorporated under that act, shall have power "to declare what shall be a nuisance, and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist." Paragraph 83 of said section and chapter provides that they shall have power "to prohibit any offensive or unwholesome business or establishment within, or within one mile of the limits of, the corporation," and paragraph 84 provides that they shall have power "to compel the owner of any grocery, cellar, soap or tallow chandlery, tannery, stable, pigsty, privy, sewer, or other unwholesome or nauseous house or place, to cleanse, abate, or remove the same, and to regulate the location thereof."

In *North Chicago City Ry. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788, which is a case exactly in point here, it was held that while, under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which in fact is clearly not one, still, that in doubtful cases, where a thing might or might not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, their action, under such circumstances, would be conclusive of the question.

In *Huesing v. City of Rock Island*, 128 Ill. 465, 15 Am. St. Rep. 129, it was said: "Under paragraphs 83 and 84 of our incorporation act, heretofore cited, we think power is conferred upon incorporated towns to prohibit slaughterhouses, or any unwholesome business or establishment, within the incorporation; and the common council of the town, by appropriate ordinance, may regulate the location of any <sup>317</sup> unwholesome business, and may cleanse, abate, or remove the same."

By virtue of the statute above quoted, and in the light of the interpretation placed upon it by these decisions, we think power was conferred upon appellee to adopt the ordinance in question.

Appellants cannot here assign for error the admission,



over their objection, of said ordinance in evidence, for the objection was one that could have been avoided by other testimony, and appellants, in order to have the question of the admissibility of the ordinance considered here, should have entered a specific, instead of a general, objection to its admission: *Sullivan v. People*, 122 Ill. 385.

It is unnecessary to discuss the question whether or not the appellant Sheets was properly served with summons to appear in the justice court where the cause was originally tried, for, having joined in the appeal taken from the judgment there rendered to the circuit court, he thereby waived any objection to the service of the summons to appear before the justice: *Wilson v. Roots*, 119 Ill. 379.

Appellants cannot complain that the amount of the fine assessed against them is less than the minimum provided for by the ordinance. The error, if such it were, is in their favor.

Under the views herein expressed sustaining the validity of the ordinance, it would be mere repetition to discuss the instructions given and refused by the trial court. Suffice it to say that we find no substantial error in the record, and the judgment of the appellate court is accordingly affirmed.

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**MUNICIPAL CORPORATIONS—POWER TO DECLARE WHAT ARE NUISANCES.** A municipal corporation may not declare that to be a nuisance which in fact is not, though it is by law empowered to declare what shall be a nuisance: *Village of Des Plaines v. Poyer*, 123 Ill. 348; 5 Am. St. Rep. 524; *Ex parte O'Leary*, 65 Miss. 80; 7 Am. St. Rep. 640, and note. That a city ordinance declares the particular use of property a nuisance does not make it such unless it be a nuisance in fact: *Tissot v. Great Southern Tel. etc. Co.*, 39 La. Ann. 996; 4 Am. St. Rep. 248, and note.

**MUNICIPAL CORPORATIONS—REGULATION OF SLAUGHTERHOUSES.**—A city may prohibit the slaughtering of animals within the city limits, or may restrict it to certain designated localities and prohibit it in others, provided it grants equal privileges to all within the designated district: *Chicago v. Rumpff*, 45 Ill. 90; 92 Am. Dec. 196. To the same effect, see *Cronin v. People*, 82 N. Y. 318; 37 Am. Rep. 564; *Milwaukee v. Gross*, 21 Wis. 241; 91 Am. Dec. 472; and *St. Louis v. Howard*, 119 Mo. 41; 41 Am. St. Rep. 630, and note.

**PROCESS.—WAIVER BY APPEARANCE:** See *Newman v. Moore*, 94 Ky. 147; 42 Am. St. Rep. 343, and note.

## DOWNING v. MAYES.

[158 ILLINOIS, 220.]

**ADVERSE POSSESSION TO DEFEAT THE TITLE OF THE OWNER** of land must be hostile in its inception, and so continue, without interruption, for twenty years. It must be actual, visible, and exclusive, acquired and retained under claim of title inconsistent with that of the owner, but need not be under a rightful claim nor paper title.

**ADVERSE POSSESSION LOST OR ABANDONED** restores the seisin to the true owner. His subsequent re-entry constitutes only a new disseisin.

**ADVERSE POSSESSION DEPENDS**, to a great extent, upon the nature of the land and the use to which it may be put, and need be only such as to inform the community that the land is in the exclusive use and enjoyment of another than the true owner.

**ADVERSE POSSESSION—ABANDONMENT.**—One holding adverse possession of land which he has inclosed, and on which he has erected buildings and improvement, does not abandon such possession by his failure to have it occupied by a tenant or otherwise for two years if, in the mean time, no other person claims or has gone into possession.

*J. N. Gridley*, for the appellant.

*R. W. Mills*, for the appellees.

323 **CRAIG, J.** This was a petition for partition, brought by Caroline Mayes (who was formerly the widow of William R. Strickland) and the heirs of Strickland, for partition of the northeast quarter of the southeast quarter of section 31, and the northwest quarter of the southwest quarter of section 32, township 17, range 12 west, in Cass county. Jesse Mayes and Finis E. Downing were made defendants to the petition.

323 William R. Strickland died in March, 1870, and it is claimed that he owned the two tracts of land at the time of his death, and that the lands then descended to his widow and children. As to the west forty-acre tract, in section 31, there is no controversy. The east forty, in section 32, belonged originally to one Benjamin Newman, and the defendant, Finis E. Downing, claims title to that tract under deed from the widow and heirs of Newman, executed in April, 1892, while, on the other hand, petitioners claim that William R. Strickland entered into the open, notorious, and adverse possession of the land in the spring of 1866, claiming as owner, and continued in such possession until his death, in 1870, and that his widow and heirs (petitioners) have continued in such adverse possession ever since, a period of over twenty years. On the hearing the court held that petitioners, under the evidence, established title under the twenty years statute of

limitations, and entered a decree according to the prayer of the petition.

It appears from the evidence that in the spring of 1866 William R. Strickland bought the forty in question from Benjamin Newman, and the forty joining it on the west from one Wagner. He obtained a deed from Wagner, but the evidence fails to show any deed or contract in writing of any character from Newman. What the contract between Newman and Strickland really was is not disclosed by the evidence in this record. At the time, the land was of little value, being all flat, swampy land, and subject to overflow, except five or six acres, which was a sand ridge. The fact that the land at the time was worth so little may have been the reason the parties did not take the trouble to reduce their contract to writing. But, however that may be, it does appear that in the spring of 1866 William R. Strickland entered upon the land, claiming to be the owner by purchase. He built a small house, stable, hogpen, smokehouse, and inclosed the entire eighty acres, with other lands. Strickland occupied <sup>334</sup> the land until he died, in 1870. After his death his widow and children continued to occupy the place until the widow married a man named Mayes, in 1877, who resided on land adjoining. After her marriage she and her children continued to cultivate the land until the spring of 1883, when her husband moved to Kansas. Before leaving for Kansas the widow placed her son in law, Powers, in the possession of the land, and he farmed it in 1883 and 1884. In the fall of 1884 Powers moved to Kansas, and the widow returned to the neighborhood where the land is located, and made repeated efforts to lease it for the year 1885, but, owing to the water on the land, she was not able to procure a tenant. In the spring of 1885 she made a further effort to rent the land, but was unable to do so. In 1886 and 1887 she attempted to find a tenant for the place, but, owing to the wet seasons, she was unable to procure a tenant. The land was not leased or farmed during the seasons of 1885, 1886, and 1887, but in February, 1888, a man named Majors rented the land from the widow, and occupied it from March until December, when he turned it over to Jesse Mayes, who has continued to occupy the land ever since.

It is well settled by the authorities that where an adverse possession is relied upon to defeat the title of the owner of lands the possession must be hostile in its inception, and so

continue, without interruption, for the period of twenty years. It must be an actual, visible, and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner. The possession need not, however, be under a rightful claim nor under a paper title: *Turney v. Chamberlain*, 15 Ill. 271. Strickland entered into possession of the land, claiming as owner. He inclosed the land (with other lands) with a fence. He erected a house, and resided on the land with his family. He reduced the land to cultivation. From the evidence it is apparent that the possession of Strickland was adverse, actual, visible, and exclusive, acquired <sup>225</sup> and held under claim of title inconsistent with the true owner, and the only question of any serious difficulty is, whether the possession was continuous for a period of twenty years. If, during the period relied upon, the possession was abandoned by Strickland or his heirs, the statute would cease to run from the time of such abandonment, and a subsequent re-entry would not be available to establish a continuous possession. When the possession is lost or abandoned, the seisin of the true owner may be regarded as restored, and a subsequent entry constitutes but a new disseisin, and the statute would only begin to run from the new entry.

What constitutes actual possession depends, to a great extent, upon the nature of the land and the use or uses to which it may be put. In *Brooks v. Bruyn*, 18 Ill. 539, it is said: "As a general rule, it is sufficient if the land is appropriated to individual use in such manner as to apprise the community or neighborhood of its locality that the land is in the exclusive use and enjoyment of another." The same rule was declared in *Kerr v. Hitt*, 75 Ill. 51.

In *Coleman v. Billings*, 89 Ill. 183, it is said: "It is true, appellee testifies that there were some periods of time when no one claiming under Miller or herself was actually residing upon the land; but actual residence, either by the party claiming or a tenant, is not indispensable to continue possession or occupancy. If there is a continuous dominion, manifested by continuous acts of ownership, it is sufficient."

In *Clements v. Lampkin*, 34 Ark. 598, in discussing what constituted a possession of lands, the court said: "The possession of Topp's vendee, once established by material acts of visible, notorious ownership, which was done by putting negroes upon it and making a deadening long known afterward as the Lampkin deadening, must be presumed to have

continued until open, notorious, and adverse possession be shown to have been taken by another."

<sup>336</sup> In *Hughs v. Pickering*, 14 Pa. St. 297, the following language of the judge at *nisi prius* seems to have been approved: "In order to destroy the continuity of possession the vacancy must not be merely occasional, such as occurs in every case where a party, from some cause unable to obtain a tenant, shuts up his property for a short time, or, indeed, for a long time."

In *Stettinische v. Lamb*, 18 Neb. 619, the court says: "Where a party erects a building on a lot, and takes actual possession of the same as his own, the fact that afterward he, or those claiming under him, rent the property, or it is unoccupied, and he have and claim the right of possession, where there is no abandonment, is not an interruption of the possession: *De la Vega v. Butler*, 47 Tex. 529. The reason is, the building, at least, belongs to the claimant, and he may use it in any manner he sees fit, and so long as no one enters the possession thereof claiming adversely to him, his possession is not interrupted. Possession being once established in *Mrs. Towle* by the erection of a building on the lot in question, and taking possession of the same, such possession will be presumed to have continued until an interruption therein is proved: *Rayer v. Lee*, 20 Mich. 384."

In *Crispen v. Hannavan*, 50 Mo. 536, there were several "breaks," so called, when no one was actually cultivating the premises, the longest of which was "from about 1861 or '62 to 1865 or '66." In discussing the charge to the jury as to what would constitute such a "break" as would destroy the possession, the court says: "It might have been inferred that, living off the premises, a failure to cultivate them for a year or more, for whatever reason, would constitute such a break. Nothing would be more erroneous. While an abandonment of the premises would so break the possession of him who has occupied that the constructive possession of the true owner would attach, and thus save his right of entry, every failure to cultivate the field for a season, or a delay in repairing <sup>337</sup> the fences when destroyed, will not be held to be an abandonment, if sufficient reason appears."

From the spring of 1866 until the fall of 1884 it is plain that Strickland and his widow and heirs held the continuous possession of the land, and if, under the facts, the possession was continued in the widow and heirs from the fall of 1884

until the spring of 1886, the bar of the statute would be complete. There is no evidence in the record that the widow and heirs intended to abandon the possession of the land, but, on the other hand, when Powers moved away, in the fall of 1884, the widow came to the premises and tried to find a tenant. Again, in the spring of 1885, she made an effort to find a tenant, but failed, on account of the wet season. After Powers left, in the fall of 1884, the land remained fenced, the buildings were all left on the land, and nothing was done to indicate an abandonment. Under such circumstances, did the widow and heirs lose the possession of the premises, or did the possession still remain in them, although they had no tenant during the year 1885 or 1886?

During the year 1885, and down to the spring of 1886, the improvements made by the Stricklands all remained on the land. The house had been damaged somewhat by hunters, but it remained on the land. The fence put upon the land to inclose it still remained. The possession of the Stricklands had not been disturbed. No person attempted to enter upon the land or invade the possession of the widow and heirs of Strickland. We think, therefore, that down to the spring of 1886 the widow and heirs of Strickland were in the possession of the land, although they were not on the land in person, and did not have a tenant thereon. Suppose a person owns a tract consisting of forty acres of land. He incloses the land with a fence, erects a house, and resides upon the land for several years. He finally concludes to change his residence, and moves to another place, but for some reason he is unable to procure a tenant. His house remains vacant ~~for~~ for three or four years, and the land is not cultivated. Does the owner, from the fact he cannot find a tenant for his land, lose the possession? We think not. If the widow and heirs had abandoned the possession of the premises, or had some other party gone into the actual possession, under a claim of right, before the twenty years had expired, there might be good ground for holding that the complainants were not entitled to invoke the statute of limitations. But such was not the case. Newman, the owner of the title, lived until 1880, and while he knew that the Stricklands were in the possession of the land claiming to own it, he never, so far as appears, set up any claim to the land, nor did his heirs set up any claim after his death. On the other hand, the Stricklands were allowed to hold the possession of

the land for over twenty years, without objection from any quarter. Under the facts, we think it is plain that the decree of the court in favor of the Stricklands was correct.

It has been suggested in the argument that Strickland entered under a contract of purchase from Newman, and, having entered under that title, his possession was not adverse. A sufficient answer to this position is, the record fails to show a contract of any description ever made or entered into between Newman and Strickland in regard to the sale or purchase of this land. No writing was produced, nor was it proven that one ever existed. Moreover, the evidence fails to show even a verbal contract for the transfer of the land from Newman to Strickland. Some loose declarations of the widow were proven, but they do not make out a contract. But if they did, the declarations of the widow could not be held as binding on the heirs of Strickland.

After a careful examination of the entire record we think the decree of the circuit court correct, and it will be affirmed.

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THE CASE OF *Noyes v. Heffernan*, 153 ILL. 339, was an action of ejectment. Plaintiff showed a regular chain of title from the government to himself. Defendant claimed title by reason of twenty years' actual adverse possession, and proved that in April, 1860, he took possession of the land in dispute, claiming it as his own, fenced it in, built a house thereon, to which he thereafter made additions from time to time, and occupied it as a dwelling with his family until 1875. Up to that time he cultivated the land and then moved away, leaving the premises in possession of his agent, to be rented for him. He moved back upon the premises with his family in October, 1882, and resided thereon thereafter. During his absence the premises were vacant for two weeks while being repaired, and during such absence one Jones, without plaintiff's knowledge, had stored barrels on, and had driven across, the premises. Upon his return he removed the barrels and stopped Jones from driving across the land. There was some evidence tending to show that from 1875 to 1882 the fence surrounding the premises was down, the doors off their hinges, and the house used as a privy. This, together with statements testified to have been made by Heffernan, that he did not own the land, were denied by him.

From 1860 to October, 1891, Heffernan paid taxes on the land, was in possession thereof, either by himself, his agent, or tenant, claiming ownership thereof. On this state of facts the supreme court, in reviewing the case on appeal from a judgment in favor of defendant, said:

"To constitute an adverse possession sufficient, in law, to defeat the right of action of the party who has the legal title, the possession must be hostile in its inception, and so continue, without interruption, for the period of twenty years. It must be an actual, visible, and exclusive possession, acquired and retained under claim of title inconsistent with that of the true owner. It need not, however, be under a rightful claim, nor even under a muniment of title. It is enough that a party takes possession of premises claiming them to be his own, and that he holds the possession for

the requisite length of time, with the continued assertion of ownership: *Turney v. Chamberlain*, 15 Ill. 271. Argument is not required to demonstrate that the evidence of the defendant establishes a defense under the case cited. . . . The judgment of the circuit court will be affirmed."

**ADVERSE POSSESSION.**—Possession must be actual, continuous, visible, and notorious, as well as hostile to the title of the owner, in order to be adverse: *Smeberg v. Cunningham*, 96 Mich. 378; 35 Am. St. Rep. 613, and note. One who has been in the open, notorious, exclusive, and adverse possession of real estate for ten years becomes vested with a valid title to the same: *Myers v. McGavock*, 39 Neb. 843; 42 Am. St. Rep. 627. To the same effect, *King v. Carmichael*, 136 Ind. 20; 43 Am. St. Rep. 303. See, further, the extended note to *Finch v. Ullman*, 24 Am. St. Rep. 389.

**ADVERSE POSSESSION—NOTICE.**—To constitute adverse possession the true owner must know that the adverse holder claims in his own right, or the possession must be so open and notorious as to raise the presumption of notice: *Normant v. Eureka Co.*, 98 Ala. 181; 39 Am. St. Rep. 45, and note. This question is fully discussed in the note to *De Fries v. Quint*, 28 Am. St. Rep. 158.

**ADVERSE POSSESSION—ABANDONMENT.**—A voluntary abandonment, with no intention of retaking possession, no matter how short, destroys adverse possession, but what is continuity of possession must, to a great degree, rest upon and be determined by the circumstances of each case: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334, and note. See the note to *San Francisco v. Fulde*, 99 Am. Dec. 282.

## CROSS v. WEARE COMMISSION COMPANY.

[158 ILLINOIS, 499.]

**MORTGAGE.**—STRUCTURES AFFIXED TO LAND in such way as to be part of the realty are proper subject matter of a real estate mortgage.

**CONVEYANCES—FORM—INTENTION.**—A conveyance need not follow any exact form, provided it expresses an intention to convey.

**CONVEYANCES—CONSTRUCTION.**—Conveyances which cannot operate as that species of conveyance indicated by the letter are held to operate in some other form, so as to effectuate the object which, from the whole instrument and the circumstances and condition of the title, the parties appear to have intended.

**CONVEYANCE UPON MORTGAGE BLANK.**—The grant of a steam elevator carries with it, as part thereof, the land upon which the elevator is located, and all that is necessarily used in connection therewith free of subsequent execution against the grantor, although the conveyance is written upon a chattel mortgage form, acknowledged as such, and the property is referred to in the instrument as goods and chattels.

**FIXTURES—WHEN DEEMED PERSONALTY.**—Many things ordinarily considered fixtures may become, to all intents and purposes, personal property, as between the parties interested in the realty and fixtures, by agreement between them to that effect.

**FIXTURES—CHARACTER OF PROPERTY NOT CHANGED BY AGREEMENT.**—If a chattel mortgage is executed upon machinery or buildings or articles



after they have been so attached to the realty as to become part of it, and the lease or other instrument of title under which the mortgagor holds does not authorize a removal of such articles, and removal cannot be made without injury to the realty or the fixture, an agreement by the parties that the articles shall be treated as personally does not have the effect of preserving their character as such.

**FIXTURES—AGREEMENT CHANGING CHARACTER OF PROPERTY.**—In cases where parties may agree among themselves to treat fixtures as personally, such agreement cannot change the character of the property as to third persons.

**ESTOPPEL.—A PARTNER WHO STATES** at the time of the execution of a mortgage by his copartner upon the firm property that the latter holds the whole title thereto is estopped from claiming that the mortgage does not convey the entire interest, and his judgment creditor, with notice, is bound by such estoppel.

**ESTOPPEL.—TITLE TO LAND MAY BE CONVEYED BY ESTOPPEL**, and creditors cannot set up the statute of frauds to defeat such an estoppel against their debtor.

*G. S. House*, for the appellant.

*Osborne Bros. & Burgett, and Hill, Haven & Hill*, for the appellees.

**MR. MAGRUDER, J.** This is a controversy between the appellant as execution creditor, and the appellee, the Weare Commission Company, as mortgage creditor, as to whether the judgment of the one or the mortgage of the other is entitled to priority of lien. Appellee's mortgage was executed and recorded before appellant's judgment was rendered.

The steam elevator, together with the cribs, office, and scales, was unquestionably real estate. The interest of the firm of Druley Brothers in the real estate described in the mortgage was a leasehold estate where the unexpired term exceeded five years. The elevator and feed-mill rested on a solid stone foundation, laid in a trench sunk into the ground below the frost line. The structures and improvements were of a permanent character. The engine and boiler were set on foundations of stone and brick; the boiler was inclosed by brick; the machinery, shafting, etc., were fixed to the elevator by bolts, screws, and nails. The engine, boiler, machinery, gearing, office, scales, etc., were necessary to the elevator business, and formed a part of the elevator plant. The structures were fixed to the land in such a way as to be a part of the realty, and constituted a part of the freehold. It is conceded by both appellant and appellee that the interest of the firm in the elevator plant as a whole was a chattel real. It was, therefore, the proper subject matter of a real

estate mortgage: *First Nat. Bank of Joliet v. Adam*, 138 Ill. 483. It is shown by the proofs that the mortgage executed by William M. Druley upon this property, on November 21, 1889, was recorded in the recorder's office of Will county, where the elevator was situated, as early as November 21, 1889. It is also shown by the evidence that appellant had actual notice of that mortgage before his judgment was rendered. Appellant's attorney, who obtained for him both his note and the judgment thereon, personally examined the record of the mortgage of November, 1889, <sup>see</sup> in the recorder's office of Will county on August 12, 1890.

The ground upon which appellant claims that the lien of the mortgages should be postponed to the lien of his judgment is that the mortgages were in form and phraseology chattel mortgages; that Druley Brothers treated the property as personalty and mortgaged it as such; that the mortgagees accepted security upon the property as personal property; that the court must hold the instruments to be chattel mortgages, and not otherwise; that, as chattel mortgages, said instruments are of no effect, for the reason that the property mortgaged is real estate, and not the subject matter of chattel mortgage, and for the further reason that the mortgage of the appellee, Weare Commission Company, was not recorded in Cook county, where William M. Druley resided: Chattel Mortgage Act, sec. 4; 2 Starr & Curtis' Annotated Statutes, 1633.

It is not denied that more than ten thousand dollars of bona fide indebtedness is due to the Weare Commission Company upon its mortgage for money loaned, and that a bona fide indebtedness of more than four thousand dollars is due to said bank upon its said mortgage.

There is no doubt that appellees made a mistake in using blank forms of chattel mortgages when they accepted their securities. It may be true that they made a mistake in not more definitely describing the mortgaged property as realty; but it is clear from the evidence that they intended to secure themselves by mortgages which should cover the property, whether it was realty or personalty. Whether the instruments are valid as chattel mortgages or not, they must have priority over appellant's execution if they can be regarded as valid securities upon the property as realty, appellant having had both constructive and actual notice of them before the entry of his judgment.

The question then arises whether the mortgages contain such words as can be regarded as including within <sup>§10</sup> their meaning an interest in realty. It is not essential that the instrument of conveyance should follow any exact or prescribed form of words, provided the intention to convey is expressed. To make a conveyance valid it is sufficient, in general, that there be parties able to contract and be contracted with, a proper subject matter sufficiently described, a valid consideration, apt words of conveyance, and an instrument of conveyance duly sealed and delivered. In a mortgage there should be a sufficient condition of defeasance, but this often rests in parol, instead of being expressed in the deed itself.

The words of conveyance used in the mortgages in this case are: "Grant, sell, convey, and confirm." The use of the word "convey" is equivalent to a grant at common law, and passes the title; it means a transfer of title from one person to another. The word "grant" is a generic term, applicable to the transfer of all classes of real property: *Patterson v. Corneal*, 3 A. K. Marsh. 618; 13 Am. Dec. 208; *Lambert v. Smith*, 9 Or. 185.

The mortgage describes the property as "the steam elevator, etc., . . . on the . . . railroad elevator lot," etc. The grant of the steam elevator carries with it, as a part of the grant, the land upon which the elevator is located, and all that is necessarily used in connection therewith. When property is granted, whatever is necessary to the enjoyment of the grant is impliedly conveyed as an incident thereto: *Tinker v. City of Rockford*, 137 Ill. 123. The grant of a house, store, mill, or other building carries with it the land under the building, and around it, which is necessary for its enjoyment: *Rogers v. Snow*, 118 Mass. 118; *Trinity Church v. Boston*, 118 Mass. 164; *Allen v. Scott*, 21 Pick. 25; 32 Am. Dec. 238. It has been held that a mortgage on a "grist and saw mill and gin, together with all the privileges and appurtenances belonging thereto," included two acres of land upon which the mill and gin were located, and which had always been used in connection therewith, and were necessary to the enjoyment <sup>§11</sup> thereof: *Kimbrell v. Rogers*, 90 Ala. 339; *Johnson v. Rayner*, 6 Gray, 107; *Baker v. Bessey*, 73 Me. 472; 40 Am. Rep. 377; *Davis v. Handy*, 37 N. H. 65; *Jamaica etc. Corp. v. Chandler*, 9 Allen, 159. The leasehold interest of Druley Brothers was necessary to the full enjoyment of the

elevator, and the language of the mortgage was broad enough to include it. There is nothing in the mortgages or leases to indicate that it was the intention of the parties to provide for a removal of the elevators from the leased ground. The habendum clause of the mortgage is: "To have and to hold the same unto the said Weare Commission Company, its successors, heirs, executors, administrators, and assigns, to its and their sole use forever."

Courts will so construe a conveyance as to give effect to the intention of the parties rather than defeat such an intention by a strict technical construction of the form of conveyance adopted. "A deed that is intended and made to one purpose may inure to another; for if it will not take effect in the way it is intended, it may take effect another way": *Russell v. Coffin*, 8 Pick. 143; *Pray v. Pierce*, 7 Mass. 381; 5 Am. Dec. 59; *American Emigrant Co. v. Clark*, 62 Iowa, 182. Courts are liberal in construing deeds so as to give them effect. "If they cannot operate as that species of conveyance indicated by the letter, they will generally be held to operate in some other form, so as to effectuate the object, which, from the whole instrument and the circumstances and condition of the title, the parties appear to have intended": *Thayer v. McGee*, 20 Mich. 195; *Bryan v. Bradley*, 16 Conn. 474.

It is claimed by appellant that appellees are estopped from asserting that the property mortgaged is not personalty, because the mortgages were written upon printed blanks intended for use as chattel mortgages, and the property is referred to therein as "goods and chattels," and the instruments were acknowledged as chattel mortgages. It is true that many things ordinarily considered fixtures to the realty may become, to all intents and purposes, <sup>512</sup> personal property by agreement of all parties interested in both the realty and fixtures: *Jones on Chattel Mortgages*, 4th ed., sec. 124. It is also true that the parties to such agreement may, under certain circumstances, be estopped from denying that the property, treated by them as personalty, is personalty: *Ballou v. Jones*, 37 Ill. 95; *Davis v. Taylor*, 41 Ill. 405. But, as a general rule, it must appear in such cases that the person making the improvement had the intention, at the time of so making it, that it should not become a part of the realty. In many of the cases where a chattel mortgage has been given upon property affixed to the realty, and where the property described therein has been held to be personalty, the debt

secured by the mortgage has been for the purchase price of the machine or other article attached, and the chattel mortgage has been executed before the article was affixed to the realty, or at about the time it was so affixed, or the agreement for security by chattel mortgage has been made before the affixing took place. In some of the cases the lease of the lessee making the improvement authorizes a removal of the property affixed. In other cases it appears that the article attached to the realty can be removed without injury to it or to the realty: *Sword v. Low*, 122 Ill. 487; *Jones on Chattel Mortgages*, 4th ed., secs. 125, 132; *Ford v. Cobb*, 20 N. Y. 344; *Trull v. Fuller*, 28 Me. 545; *Tyler's Law of Fixtures*, 671, 673; *Ewell on Fixtures*, 69; *Tift v. Horton*, 53 N. Y. 377; 13 Am. Rep. 537; *Warner v. Kenning*, 25 Minn. 173; *Henkle v. Dillon*, 15 Or. 610; *Fortman v. Goepper*, 14 Ohio St. 558; *Sisson v. Hibbard*, 75 N. Y. 542. In such cases the agreement that the personalty attached to the realty shall continue to be personalty will prevail as between the parties to the agreement: *Ewell on Fixtures*, 68; *Dobschuets v. Holaday*, 82 Ill. 371.

But where a chattel mortgage is executed upon machinery or buildings or articles after they have been so affixed to the realty as to become a part of it, and <sup>518</sup> where the lease or other instrument of title, under which the mortgagor holds, does not authorize a removal of the thing attached, and where such removal cannot be made without injury to the realty or to the fixture itself, the agreement of the parties will not have the effect of preserving the character of personalty in the things so affixed to the freehold: *Ewell on Fixtures*, 23, 24, 68, 69, 317, 318; *Jones on Chattel Mortgages*, secs. 130, 131. Where such conditions exist the case does not come within any exception to the rule, that parties cannot, by their mere agreement, convert into personalty that which the law declares to be real estate: *Docking v. Frazell*, 34 Kan. 29. Here, the chattel mortgages were executed long after the elevator had been constructed and the machinery had been placed in it, that is, after the improvements had become a part of the realty; the leases to Druley Brothers granted no authority for the removal of the improvements erected by them; and a removal of the elevator plant could not have been made without injury to it and to the realty: *Sword v. Low*, 122 Ill. 487. It is unnecessary to inquire whether or not Druley Brothers, or the survivor of

them, or the representatives of either, would be estopped from denying that the elevator plant was personalty if this was a proceeding by appellees to foreclose their mortgages as chattel mortgages; because both they and appellees claim that the mortgaged property is realty. And not only is this so, but appellant, claiming adversely to both of them, contends that the property levied upon under his judgment is realty. In cases where parties may agree among themselves to treat fixtures as personalty, their private agreement cannot change the character of the property so far as third persons are concerned: *Dobschuetz v. Holliday*, 82 Ill. 371; *Rowand v. Anderson*, 33 Kan. 264; 52 Am. Rep. 529; *Lacustrine Fer. Co. v. Lake Gueno etc. Co.*, 82 N. Y. 476; *Jenny v. Jackson*, 6 Ill. App. 33; 8 Am. & Eng. Ency. of Law, 61, and cases in note. The language used by Mr. Justice Cooley in *Lyle v. Palmer*, 42 Mich. 314, is applicable here. In that case it was said: "The circuit judge finds that the machinery was personalty. This finding was no doubt based upon the fact that the parties so believed and considered it. This may generally be conclusive, but not always, and in this case it is clear the parties were mistaken. The machinery was especially adapted for use in connection with the real estate. It was put up for use and actually used with it, and was not severed from the realty in ownership. The fact that in the mortgage it was specially described was unimportant." For the reasons stated, we are inclined to hold that the mortgages in this case were sufficient for the purpose of conveying the property described therein as realty, as against the levy made by appellant under his judgment.

The point is made that the mortgage to the Weare Commission Company is executed by William M. Druley, and is not signed by Albert A. Druley; that it does not purport to be made by the partnership, and therefore only passed such individual interest in the realty as would remain to William M. Druley after the firm debts are paid. The evidence is clear that the elevator plant was owned by the firm of Druley Brothers; it was built with firm money; the leases from the railroad companies are to the firm of Druley Brothers; the notes secured by the mortgages are the notes of the firm; and the advances of money, which the notes represent, were made to the firm. Albert A. Druley testifies that the property was partnership property. The agent of the Weare Commission Company swears that when he took its mortgage, Albert A. Druley told

him that he had no interest in the elevator; that it was owned by his brother; and that, therefore, it was unnecessary for him to sign the mortgage. Albert denies that he made such statement. The agent is confirmed by several circumstances, and, among others, by the fact that certain warehouse receipts pledged as collaterals for advances, and signed and <sup>515</sup> acknowledged by Albert A. Druley, speak of certain grain as being stored "in the elevator owned by W. M. Druley." The lower courts have found that Albert A. Druley did make the representations here attributed to him, and we are not prepared to say that their finding is not sustained by the evidence. This being so, Albert A. Druley is estopped from denying that William M. Druley had a right to convey the entire interest of the firm, and from questioning the validity of the instrument. Where a person induces another to believe in the existence of a certain state of things, and to act on that belief so as to alter his own previous position, he is concluded from averring against such other person a different state of things as existing at the same time. A party who stands by and sees another acting to his injury, and declares that he himself has no claim, will not be permitted in equity to afterward assert his title, to the injury of the person whom he has thus misled. It is sufficient if there would be a fraudulent effect from the evidence attempted to be set up. A court of equity has power to establish a title to real estate by estoppel against the former owner, who by his acts and representations has induced another to purchase or take a mortgage from one holding a defective or partial title: *Hill v. Blackwelder*, 113 Ill. 283; *Mills v. Graves*, 38 Ill. 455; 87 Am. Dec. 314; *Wade v. Bunn*, 84 Ill. 117; *Robbins v. Moore*, 129 Ill. 30. In *Moran v. Palmer*, 13 Mich. 367, where a partner conveyed a partnership lot in his own name, and received another lot in exchange therefor, and sold the latter, and the firm received the proceeds of the sale, it was held that the court would presume knowledge on the part of all the partners of such exchange, and that the receipt by the partnership of the proceeds of the lot sold estopped the heirs of the partner not joined in such deed from afterward setting up a claim to the lot first named. Here, Albert A. Druley, as a member of the firm of Druley Brothers, received the benefit of all the advances secured by the mortgage made by his partner.

<sup>516</sup> We think that the appellant is as much affected by the estoppel as Albert A. Druley, for he had notice of the

equities of the appellees before his judgment was rendered. The finding of the courts below upon this subject is sustained by the evidence.

The statute of frauds cannot be interposed to defeat the application of the doctrine of estoppel. Title to land may be conveyed by estoppel. Creditors cannot set up the statute to defeat an estoppel against their debtor: *Singer v. Carpenter*, 125 Ill. 117; *Hill v. Blackwelder*, 113 Ill. 283; *Robbins v. Moore*, 129 Ill. 30; *Wade v. Bunn*, 84 Ill. 117.

The judgment of the appellate court is affirmed.

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**CONVEYANCES—FORM—INTENT.**—No precise technical words are required to be used in a conveyance of real estate. The use of any words which amount to a present contract of bargain and sale is sufficient. Whatever may be the inaccuracy of expression, or the inaptness of the words used in the instrument, the courts will give effect to it if an intention to pass the title can be discovered therefrom: *Harlowe v. Hudgins*, 84 Tex. 107; 31 Am. St. Rep. 21, and extended note.

**ESTOPPEL—INURING OF TITLE BY.**—If a deed of gift contains words of conveyance purporting to convey property in fee simple, any title subsequently acquired by the grantor will vest in the grantee as against subsequent purchasers having notice of such deed: *Ford v. Unity Church Society*, 120 Mo. 498; 41 Am. St. Rep. 711, and note.

**MORTGAGE OF FIXTURES—AGREEMENTS.**—The character of property as real or personal may be fixed by contract with the owner of the real estate when the article is placed in position, but such contract cannot affect the rights of a mortgagee: *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519; 15 Am. St. Rep. 235, and note; *Fifield v. Farmers' Nat. Bank*, 148 Ill. 163; 39 Am. St. Rep. 166, and note. See, also, the extended note to *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 153; and *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211; 43 Am. St. Rep. 491.

**FIXTURES—EFFECT OF CONTRACTS AS TO.**—It is entirely competent for parties to agree as to the character of articles placed upon real estate, whether they become part of the realty or remain personalty: Note to *Merchants' Nat. Bank v. Stanton*, 43 Am. St. Rep. 493. See, further, the notes to *Fifield v. Farmers' Nat. Bank*, 39 Am. St. Rep. 172, and the extended note to *Lavenson v. Standard Soap Co.*, 13 Am. St. Rep. 154.



## SWEETSER v. MATSON.

[188 ILLINOIS, 568.]

**EXECUTIONS, WHEN DORMANT.**—An execution creditor, by consenting to a postponement of sale under his execution to allow his debtor to settle with his creditors thereby loses his priority of lien as against a junior execution levied during such postponement, although consent to such postponement is granted through kindness, without intent to hinder or defraud creditors.

**EXECUTIONS—POSTPONEMENT OF SALE.—FRAUD ARISES AS A LEGAL CONCLUSION** from the consent of a creditor to a postponement of sale under his execution, although he is actuated only by motives of kindness and leniency toward his debtor, and gives a preference to a junior execution levied during the pendency of such postponement.

*Weigley, Bulkley & Gray*, for the appellants.

*Duncan & Gilbert*, for the appellee.

**578** **BAILEY, J.** The eighty-seventh section of the statute in relation to practice in courts of record provides that when any final determination shall be made by the appellate court, as the result, wholly or in part, of a finding of the facts concerning the matter in controversy different from the finding of the court from which the cause was brought by appeal or writ of error, it shall be the duty of the appellate court to recite in its final order, judgment, or decree the facts so found, and the judgment of the appellate court shall be final and conclusive as to all matters of fact in controversy in such cause. In this case the appellate court has found the facts upon which its judgment is based, and has recited those facts in its final judgment, and it is insisted that recital is conclusive in this court as to all the facts in the case.

It is urged, however, with much earnestness that the section of the statute here referred to is not applicable to this case, for the reason that there was not, either in the appellate court or in the trial court, any substantial controversy as to the material facts, and that the judgment of the appellate court, therefore, was not, and could not have been, the result, either wholly or in part, of any finding of facts different from the finding of the trial court, but only of a difference of opinion between the two courts as to the legal consequences of facts about which there was really no controversy.

It must be admitted that the power of the appellate court to find and recite the facts in such way as to make **579** its recital the exclusive evidence of what the facts in controversy are is purely statutory, and can be exercised only in

those cases to which the statute applies, and there seems to be much reason for the contention that where the facts are not really in controversy there can be no occasion for the appellate court to find and recite them in its final judgment. In such case, its determination cannot, in the nature of things, result from a difference between its finding and that of the trial court as to the facts, and consequently no case is presented which is within either the letter or intention of the statute.

It is urged in this case that the practical objection to accepting the recital of facts found in the final judgment of the appellate court, instead of taking them as they appear in the record of the trial court, arises, not so much from any inaccuracy in the recitals of the appellate court, so far as they go, as from the omission, as the plaintiffs insist, of various material and undisputed facts which appeared before the trial court. If, then, the findings of the appellate court are to be taken as the final, plenary, and conclusive recital of all the facts in the case, it is insisted that the plaintiffs will now be deprived of the benefit of the omitted facts, though proved at the trial and not controverted.

But while we are disposed to think that there is much force in the contention, we are inclined to base our decision solely upon the facts as recited in the judgment of the appellate court. It appears from that recital that the nine executions in favor of the Hibernian Banking Association, Nano Murphy, and E. W. Price were placed in the hands of the defendant, as sheriff, January 8, 1890; that on the same day the defendant levied those executions upon the two stocks of goods in question; that he advertised the same for sale on January 22, 1890, but postponed the sale to January 29th, and again to February 8th, and again to February 11th, and finally to February 13th, at which last-mentioned date the Wabash avenue stock <sup>ssd</sup> of goods was sold, the Blue Island avenue stock being sold, after similar postponements, on February 15th. It is further recited, in substance, that these several postponements of the sales were made, as aforesaid, by the defendant, with the consent of the execution debtor, and at the request of the plaintiffs in the executions, with the hope that the execution debtor might make some arrangements with his creditors and for his benefit.

On the fifth day of February, which was pending the postponement from January 29th to February 8th, the execution

of the plaintiffs in this suit came into the hands of the defendant, as sheriff, and the question is whether at that date the senior executions were, or thereafter became, as against the junior execution, dormant, so as to give to the junior execution priority of lien.

The theory upon which it is claimed that the senior executions became dormant is, that the several postponements of the sale, made, as they were, at the request of the execution creditors, for the benefit of the execution debtor, and for the purpose of aiding him in making some arrangement with his creditors, constituted an employment of the writs for an object inconsistent with their nature, and were such a perversion of them from their legitimate purpose as rendered them fraudulent and void as against other creditors.

It is true, the appellate court found, as a matter of fact, that the senior executions were not taken out or used by the plaintiffs therein, or by the sheriff, for the purpose of hindering, delaying, or defrauding any of the creditors of the execution debtor, and that the postponements of the sale were reasonable and proper, under the circumstances, and did not, in fact, in any manner injure, or tend to injure, delay, defraud, or hinder the plaintiffs in the junior execution, or any other creditor of the execution debtor, in the collection of their demands against him. If the present case is one in which the appellate court was required by the statute to find the facts and <sup>581</sup> recite the same in its final judgment, it must, of course, be conceded that this finding is conclusive that in the several postponements of the sale there was no fraud in fact, that is to say, there was no actual intention on the part of the plaintiffs in the senior executions, or of the sheriff, to hinder, delay, or defraud other creditors, and that the postponements of the sale did not, in fact, have that effect. But it is clear that the finding of the appellate court upon the question whether the use made of the executions was fraudulent can be given no effect beyond this. Whether there was fraud in law, that is to say, whether fraud resulted, as a legal consequence or conclusion, from the postponements of the sale, made in the manner and for the purposes above stated, is a legal question, in respect to which the findings of the appellate court can have no binding effect in this court.

Does the law, then, from the facts as found, imply such fraud as must be held to be sufficient to postpone the senior

executions to the lien of the junior creditors? The general doctrine applicable to this subject is stated by Freeman in his treatise on Executions, as follows: "An execution and its lien may be avoided by such conduct on the part of the plaintiff as shows an improper use of his writ, though the motives influencing such conduct, instead of being fraudulent, were grounded in kindness and charity toward the defendant, and free from the slightest design to injure others. The only proper use of an execution is to enforce the collection of a debt, and to enforce it with a considerable degree of diligence. To employ it for other objects is inconsistent with its nature, and such a perversion from its legitimate purposes as brings upon it the penalty prescribed by the statute of Elizabeth. The plaintiff in execution may desire to allow the defendant time in which to make payment, and yet may wish to save himself from all hazard arising from his delay to enforce collection of his judgment. He is likely, therefore, to take out execution with a view of <sup>582</sup> binding defendant's property, but with no intent to make any immediate levy or sale—in other words, he seeks to convert an execution into a mere mortgage. This the law will not tolerate": 1 Freeman on Executions, sec. 206. And again: "The lien of an execution is designed to assist the plaintiff while he is seeking to enforce the writ. If at any time he is shown not to be seeking such enforcement, then, during such time, he is without any execution lien, and is liable to lose the benefit of his writ through the sale or incumbrance of the defendant's property, or by the operation of a junior writ. He cannot avoid this result by showing that his intentions were meritorious, or that he knew of no other creditors. Whenever, by the plaintiff's orders, or by agreement between him and the defendant, the execution of the writ is suspended, by directions not to levy, or, after levy, by directions not to sell, whether such directions are permanent in their nature or designed to operate only until further orders are given, then, according to the decided preponderance of the authorities, the lien is also suspended, and the execution becomes dormant": 1 Freeman on Executions, sec. 206.

In *Gilmore v. Davis*, 84 Ill. 487, this court stated the rule as follows: "We believe the doctrine to be, as the object of an execution is to obtain satisfaction of the judgment on which it issues, on its delivery to the proper officer it gives to the creditor a priority, because the law imposes the duty

upon the officer to execute it without delay. Any act of the creditor, therefore, diverting the execution from this purpose, renders it inoperative against other creditors, and clothes them with priority." In that case an execution was placed in the hands of the officer with instructions not to levy until further orders, and it was held to be subordinate to another execution afterward issued to the officer with instructions to proceed at once. In *Ross v. Weber*, 26 Ill. 221, a judgment creditor entered into an agreement with his debtor to stay his execution, and it was held that the execution <sup>was</sup> thereby became dormant, and that the creditor lost the lien acquired by his levy.

But an execution does not become dormant or fraudulent by the mere indulgence or negligence of the sheriff. "The concurrence of the plaintiff is necessary to produce that result, and, if the delay in proceeding under an execution arises from the orders of the party by whom it has been issued, or from collusion with him, such delay will render the execution fraudulent and void as against all other creditors of the defendant": *Murfrees on Sheriffs*, sec. 536. See, also, *Eberle v. Mayer*, 1 Rawle, 366; *Commonwealth v. Stremback*, 3 Rawle, 341; 24 Am. Dec. 351; *Hickman v. Caldwell*, 4 Rawle, 376; 27 Am. Dec. 274; *Kellogg v. Griffin*, 17 Johns. 274; *Berry v. Smith*, 3 Wash. C. C. 60; *Korem v. Roemhold*, 6 Ill. App. 275; *Baldwin v. Freydendall*, 10 Ill. App. 106.

The application of these rules to the present case must result, we think, in the conclusion that, at the time the junior execution was placed in the hands of the sheriff, the senior executions were dormant, so as to give priority to the junior writ. The postponements of the sale from time to time do not seem to have been made by the sheriff for want of bidders, nor in the exercise by him of the discretion which the law vested in him in matters of that character, but they were all made as the result of the interference by the creditors in the due execution of their writs, and at their express request, and for objects inconsistent with the nature and purposes of the writs. On that subject, as we have already seen, the appellate court found the fact to be that all these postponements of the sale were made by the sheriff at the request of the plaintiffs in the executions, and for the benefit of the execution debtor, and with the hope that the debtor might make some arrangement with his creditors.

That such use of the writs constituted a perversion of

them from their legitimate purposes seems to us too plain to admit of serious doubt. Action under them was postponed, from time to time, for the mere purpose of giving <sup>see</sup> the debtor an opportunity to negotiate with his other creditors in such a way as to secure from them some compromise or other advantage. This, manifestly, was not a purpose for which the writs could be legitimately used.

It matters not that the creditors were actuated by motives of kindness or leniency to their debtor, or that they had no actual intention to hinder or defraud other creditors; nor is it a controlling circumstance that the various postponements of the sale did not, as a matter of fact, hinder, delay, or defraud other creditors. Fraud arises from such abuse of the writs as a legal conclusion, and the consequence which the law imposes is to give to a junior execution coming into the hands of the sheriff during the pendency of such postponements a preference over the writs used for such fraudulent purpose.

The senior creditors having thus lost their priority, the sheriff, in distributing the proceeds of the sale of the goods, should have satisfied the junior execution first, and, sufficient money having been realized to more than satisfy that execution, his return that he could find no property of the execution debtor with which to satisfy it was a false return, which entitled the plaintiffs therein to recover from him the amount of their judgment and costs.

We are of the opinion, therefore, that the judgment of the superior court was justified by the facts, and the judgment of the appellate court will accordingly be reversed, and the judgment of the superior court will be affirmed.

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**DORMANT EXECUTIONS.** — An execution lien upon personalty is lost as against a junior execution creditor by ordering the sheriff to postpone the sale from time to time, and allowing the property to remain in the hands of the defendant without requiring a bond of him: *Albertson v. Goldsby*, 28 Ala. 711; 65 Am. Dec. 380, and note. If a judgment creditor enters into an agreement with his debtor to permit the latter and a sheriff's keeper to remain in possession, and sell the goods at private sale while it is being advertised by the officer, his execution will be postponed, and a junior writ first satisfied: *Parys' Appeal*, 41 Pa. St. 273; 80 Am. Dec. 615, and note. A direction to the sheriff "to stay proceedings until further order, levy to remain," under an execution upon personalty, being an arrangement for the security of the debt, renders the lien of the execution of no effect as to third persons: *Commonwealth v. Stremback*, 3 Rawle, 341; 24 Am. Dec. 351, and note. A lien on land existing by virtue of a levy under execution is

not lost by delay in proceeding to sale when no fraudulent purpose is shown on the part of the execution creditor: *Ludeman v. Hirth*, 96 Mich. 17; 35 Am. St. Rep. 583. An agreement to postpone the issue of an execution, or directions to a sheriff to hold an execution until further orders, will not prejudice the rights of the plaintiff if he has a judgment lien, and makes his sale before such lien expires: *Slattery v. Jones*, 96 Mo. 216; 9 Am. St. Rep. 244. See, further, on this subject, the note to *Hollister v. Vanderlin*, 44 Am. St. Rep. 659.

## HOLBROOK v. FORD.

[189 ILLINOIS, 622.]

**FOREIGN RECEIVERS—RIGHTS OF RESIDENT CREDITORS.**—As between a foreign receiver, assignee, or trustee and a resident attaching creditor, the latter is protected by the courts of his state.

**RECEIVERS—RIGHT TO MAINTAIN SUIT.**—The rule that a foreign receiver is not allowed to maintain suit against assets of an insolvent debtor, as against a resident creditor, has no application to a receiver appointed by the courts of one state, under its laws, in a suit brought by a non-resident creditor.

**RECEIVERS—POWER TO APPOINT.**—The courts of one state may appoint a receiver for a foreign corporation doing business therein and having property there, notwithstanding the appointment of a receiver at the domicile of the corporation.

**RECEIVERS—POWER TO APPOINT.**—A receiver for a foreign corporation cannot be appointed if the corporation has no property in the state of the appointing court, and has not appeared or been served with process, and none of its officers or agents are to be found in that state.

**CORPORATIONS—DOMICILE—SITUS OF DEBTS.**—A foreign corporation has its domicile in the state from which it derives its existence, and the situs of its debts is in that state.

**CREDITOR'S BILL FILED AGAINST A FOREIGN CORPORATION,** without service of process thereon, creates no lien upon debts due thereto by foreign creditors.

**RECEIVER FOR FOREIGN CORPORATION TAKES NO TITLE TO DEBTS** due it from debtors in another state, though in the ordinary course of business the debts would be payable to the corporation in the state of his appointment.

**RECEIVERS—WAIVER OF CONTEMPT.**—If a party has been guilty of contempt of court by bringing suit against a receiver without leave, the contempt is waived by the appearance of the receiver in the suit.

**RECEIVERS—ATTACHMENT AGAINST—CIVIL CONTEMPT.**—Interfering with property in the possession of a receiver by attaching it is a civil contempt, and a motion to commit for such contempt may be answered by showing that the receiver has waived it.

**CONTEMPT IN CIVIL CASES—RIGHTS OF PARTIES.**—A court of equity asked to proceed as for a contempt against a creditor, who seeks to reach, by attachment or garnishment, debts due to an insolvent debtor from persons residing out of the state, may properly inquire which of the parties has a paramount right or superior equity to such debts.

PALMER, a resident of New York, brought suit and obtained judgment in Illinois against the Powerville Felt Roofing Company, and then filed a creditor's bill in the superior court of said state, and procured the appointment of Holbrook as receiver. He filed a petition in the action setting up his appointment as receiver; that debts were due the corporation in Nebraska and Minnesota; that attachment and garnishment proceedings had been instituted by Ford in the courts of those states against the debtors of the corporation; that Holbrook, as receiver, had notified said debtors of his right to collect the amounts due from them; that he had notified Ford of his claim, and requested him to withdraw his suits; and that Ford, by instituting such proceedings against such claims, was interfering with property belonging to the receiver. The petition then prayed that Ford be required to show cause why he should not be punished for contempt of court. Ford answered, and, on the hearing, it was shown that on the application and motion of Holbrook he was made a party in the Nebraska court to the proceedings instituted by Ford. Judgment committing Ford for contempt, and he appealed.

*Flower, Smith & Musgrave, for the appellant.*

*C. B. Samson, for the appellee.*

639 MAGRUDER, J. It is claimed that the decree of the superior court is erroneous, because it inures to the benefit of Palmer, the nonresident complainant in the creditor's bill, rather than to the benefit of Ford, the attaching creditor in the foreign states, who is a resident of the state of Illinois. Where the controversy is between a foreign receiver, assignee, or trustee, and an attaching creditor who resides in the state where the attachment proceeding is instituted, the courts of the latter state will protect its own citizen. This doctrine proceeds upon the ground that such an official, appointed under the laws of one state, has no extraterritorial right of action except as a matter of comity, and that, as against its own citizens, no state will extend its comity to a receiver, assignee, or trustee appointed under the laws of another state.

In *Heyer v. Alexander*, 108 Ill. 385, a voluntary assignment for the benefit of creditors, executed by a resident of Missouri in that state, and under its laws, and conveying property in Illinois, was held not to be operative to convey the title, as against creditors resident in Illinois suing by attachment.



The contest there was between an attaching creditor resident here and an assignee under a foreign assignment.

In *Rhawn v. Pearce*, 110 Ill. 350, 51 Am. Rep. 691, where creditors residing in Pennsylvania brought an attachment suit in Illinois against their debtor, also residing in Pennsylvania, and garnisheed a debt due to said debtor from a firm in Illinois, and trustees, residing in Pennsylvania, and appointed by a court in that state, and vested by a statute <sup>640</sup> in that state with the title to said debtor's estate, interpleaded in the garnishment proceeding and claimed the property, it was held that the statutory title of the trustees was inoperative as against the attaching creditors, and that the transfer to the trustees, being by mere operation of the Pennsylvania statute, could not have any extraterritorial effect, so as to be operative in this state, either against our own citizens or the citizens of other states. There the contest was between a foreign statutory trustee, without any conveyance by the owner of the property, and a foreign attaching creditor.

In *May v. First Nat. Bank*, 122 Ill. 551, a New York firm made an assignment for the benefit of creditors, executed in conformity with our statute for the conveyance of real estate, and conveying land in Cook county, Illinois, and recorded in the recorder's office of that county on July 28, 1884; on August 22, 1884, a bank in Massachusetts commenced an attachment suit against said firm in Cook county, and levied the writ upon said land; the assignee interpleaded and set up the deed of assignment; and it was held that the deed of assignment was valid as against the Massachusetts creditor, it not being in contravention of our laws or public policy. There the contest was between an assignee in a voluntary assignment executed by a nonresident debtor and a foreign attaching creditor. To the same effect is *Juilliard v. May*, 130 Ill. 87.

In *Woodward v. Brooks*, 128 Ill. 222, 15 Am. St. Rep. 104, creditors living in Pennsylvania brought attachment in Illinois against their debtor, who also lived in Pennsylvania, and garnisheed money in Illinois due to said debtor; before the attachment the debtor had made a voluntary assignment for the benefit of creditors valid under the laws of Pennsylvania, and had recorded it in that state; the assignee interpleaded, claiming the money in the garnishee's hands; and it was held that "as a voluntary foreign assignment, valid in the state where made, is enforced in the state <sup>641</sup> as a matter

of comity, our courts will not enforce it to the prejudice of our citizens who may have demands against the assignor; . . . but for all other purposes, and between citizens of the state where the assignment was made, if valid by the *lex loci*, it will be carried into effect by the courts of this state." There the contest was between a foreign assignee and attaching creditors resident in the same state with the assignor and where the assignment was made.

In the recent case of *Townsend v. Coze*, 151 Ill. 62, the controversy was between foreign creditors attaching in this state the property of a foreign corporation, and the assignee in a foreign assignment which was not voluntary, but statutory; and it was held that such an assignment was not operative in this state as against the attaching creditors.

In the case at bar there is no controversy between any foreign receiver or assignee on the one side, and a domestic creditor on the other. The receiver, here seeking to stop the prosecution of the suits in Nebraska and Missouri by a creditor living in Illinois, is an Illinois receiver, appointed by an Illinois court in a proceeding pending in Illinois. It is true that Palmer is a resident of New York, but he brought suit and obtained judgment in Illinois, and filed his bill and procured the appointment of a receiver here. But nonresident creditors have the same right to pursue the remedies prescribed by our laws for the collection of debts as resident creditors have. "Once properly in court and accepted as a suitor, neither the law, nor court administering the law, will admit any distinction between the citizen of its own state and that of another": *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; 38 Am. Rep. 518. A foreign receiver, holding his office by operation of a foreign law, will not be allowed to maintain a right of action against the assets of an insolvent debtor in this state as against a creditor resident in this state; but no such restriction applies to a receiver appointed by the <sup>642</sup> courts of this state and under its laws, even though such receiver is appointed in a suit instituted by a nonresident creditor.

It is sought to distinguish the present case from *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, upon the alleged ground that there the complainants in the creditor's bill in which the receiver was appointed were either residents of Illinois, or are not shown to have been nonresidents of this state, while here the complainant is a nonresident. We do

not think that any such distinction can be drawn, because the residence of the complainant is immaterial where the receiver is the officer of a court in this state.

Nor can any distinction be fairly drawn between this case and the Sercomb case, on the ground that Sercomb, the party enjoined from prosecuting the attachment suit in the District of Columbia, was the representative of a foreign corporation, while here Ford, the creditor enjoined from prosecuting the foreign attachments, is a resident of Illinois. The right of a court of equity to restrain the prosecution of a suit in another state is founded upon the fact that the court is vested with authority over persons within the limits of its jurisdiction and amenable to its process. Here, Ford is a resident of Illinois, doing business in Chicago. In the Sercomb case, Sercomb, though the agent of a Connecticut corporation, lived in Illinois, was the business manager of the corporation here, began and controlled the attachment suit in Washington, and was amenable to process in this state: *Dehon v. Foster*, 4 Allen, 545; *Cole v. Cunningham*, 133 U. S. 107.

But there are several respects in which the facts here differ from those in the Sercomb case. In the first place, the creditor in that case, who instituted the attachment proceeding in the foreign jurisdiction, had full knowledge, before he did so, of the appointment of the receiver in the creditor's suit in Illinois. Here, although the receiver was appointed ten days before Ford began his attachment proceedings in the foreign jurisdictions, yet <sup>and</sup> Ford had no notice or knowledge of such appointment when he garnished the debts due the judgment debtor in Nebraska and Missouri. Such previous knowledge of the appointment of the receiver, or of the insolvency of the principal debtor, has been deemed material in those cases where courts have enjoined the prosecution of foreign suits, or have committed the creditors to prosecuting them for contempt: *Dehon v. Foster*, 4 Allen, 545; *Chafee v. Quidnick Co.*, 13 R. I. 442; *Vermont etc. R. R. Co. v. Vermont Cent. R. R. Co.*, 46 Vt. 792.

In the second place, the principal debtor in the present case is a foreign corporation. A court in one state may appoint a receiver for a corporation organized in another state, and doing business within its own territory and having property there. This may be done, although the courts in the home state of the corporation may have already placed its affairs in the hands of a receiver: *De Berner v. Drew*, 57 Barb.

438; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Hunt v. Columbian Ins. Co.*, 55 Me. 290; 92 Am. Dec. 592; *Life Assn. of America v. Fassett*, 102 Ill. 315. The receiver appointed in the foreign state will be regarded as ancillary or auxiliary to the receiver appointed in the state to which the corporation owes its creation: 8 Am. & Eng. Ency. of Law, 408. Hence we do not consider the fact that receivers were appointed in New York and New Jersey for the Powerville Felt Roofing Company, Limited, the corporation defendant in the present case, as in any way restricting the right of the courts in this state to appoint a receiver for such defendant, if the other necessary conditions to the appointment of such receiver existed here.

The general rule is, that a court of equity will not appoint a receiver for a foreign corporation where such corporation has no property in the state of the appointing court, and has not appeared or been served with process in the proceeding in which the appointment of the receiver is applied for, and where none of the officers <sup>614</sup> or agents controlling or representing the corporation reside or are to be found in the state of the appointing court. The object of appointing a receiver for a foreign corporation is to preserve its property and effects for the benefit of creditors and shareholders: Wait on Insolvent Corporations, sec. 188; 8-Am. & Eng. Ency. of Law, 408; *Life Assn. of America v. Fussett*, 102 Ill. 315; *Redmond v. Hoge*, 3 Hun, 171; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Shaw v. Shore*, 5 L. J., N. S. 79; *Stafford v. American Mills Co.*, 13 R. I. 310; *Hannibal etc. R. R. Co. v. Crane*, 102 Ill. 249; 40 Am. Rep. 581.

In the case at bar it appears that all the tangible property of the Powerville Felt Roofing Company, Limited, in Cook county, Illinois, was taken by the sheriff under the Eberts judgment, and is now in the hands of the Chicago Title and Trust Company, a receiver appointed in another proceeding; and that the company ceased doing business in this state on November 25, 1892, and that, at the time this creditor's bill was filed, no officer, agent, or employee of said company resided or had any place of business in this state. It furthermore appears from an examination of the record that the receiver was appointed upon the same day on which the creditor's bill was filed; and that the roofing company, the judgment debtor, was not served with process, nor did it enter its appearance in the cause, either before such appointment or at

any time thereafter. We do not deem it necessary, however, to hold that there were no assets of the roofing company in this state which would justify the appointment of a receiver. As the receiver appointed for a foreign corporation must be appointed to take possession of the assets in the state where he is appointed, and acquires title to such assets only, the question arises whether the debts owing to the roofing company from the parties in Nebraska and Missouri can be regarded as property or assets in Illinois.

<sup>645</sup> In construing the meaning of the words "property in this state," we have held that, "since the only property right which there can be in a debt is the mere right to receive payment of it, it is impossible that there can be any thing of a tangible nature connected with such right which can occupy locality, and so the property right must accompany and remain with the person of the owner of the debt, and, therefore, it cannot be in this state when the domicile of the owner is in another state": *Cooper v. Beers*, 143 Ill. 25. "Contracts respecting personal property and debts are now universally treated as having no situs or locality, and they follow the person of the owner in point of right": Story's Conflict of Laws, sec. 362, *Mobilia inhærent ossibus domini*. Wharton on Conflict of Laws, section 363, says: "The remaining theory . . . is that of the *lex domicilii* of the creditor. This theory is now generally accepted in England and the United States. . . . *Mobilia sequuntur personam* is a maxim, . . . peculiarly applicable to debts which have no local site, and which therefore follow the owner."

Here, the debts garnisheed belong to the Powerville Felt Roofing Company, Limited, which is a corporation organized under the laws of New York. A foreign corporation has its domicile in the state from which it derives its existence: 8 Am. & Eng. Ency. of Law, 330, and cases cited. "A corporation is an artificial being, and has no dwelling either in its office, its warehouses, its depots, or its ships. Its domicile is the legal jurisdiction of its origin, irrespective of the residence of its officers or the place where its business is transacted": *Merrick v. Van Santvoord*, 84 N. Y. 208; *Baltimore etc. R. R. Co v. Glenn*, 28 Md. 287; 92 Am. Dec. 688; *Insurance Co. v. Francis*, 11 Wall. 210; *State Treasurer v. Auditor General*, 46 Mich. 224. The residence of a corporation is the state which creates it. It cannot change its domicile at will, and, although it may be permitted to transact business in

another state, it cannot on that account acquire a residence there: *Insurance Co. v. Francis*, 11 Wall. 210; *Dacey on Domicile*, 112; *Kirtland v. Hotchkiss*, 100 U. S. 491.

Inasmuch, therefore, as the debts due to the roofing company must be regarded as situated at its domicile, they are located in New York and not in Illinois, and cannot therefore be regarded as passing to appellant as receiver. Even if the residence of the debtors should be regarded as the location of these debts, they would not be property or effects in Illinois, but would be located in Nebraska and Missouri.

The commencement of a suit by filing a bill does not constitute *lis pendens* until summons or subpoena has been served: *Grant v. Bennett*, 96 Ill. 513. Accordingly, it has been held that the lien created by a creditor's bill only comes into existence by the filing of the bill and service of process: *Hallorn v. Trum*, 125 Ill. 247; *King v. Goodwin*, 130 Ill. 102; 17 Am. St. Rep. 277; *First Nat. Bank v. Gage*, 93 Ill. 172. Here, as there was no service of process upon the roofing company, no lien, equitable or otherwise, could have been acquired upon the debts garnisheed by appellee.

It is claimed that, in the ordinary course of the business of the roofing company as conducted at its Chicago branch, these debts would have been payable at the Chicago office, and that their situs must be regarded as being in Illinois, because they are thus alleged to have been payable in Illinois. There would be much force in this position if the debts were payable to a domestic corporation, but it cannot be considered as entitled to much weight here, where the debts are payable to a foreign corporation: *Osgood v. Maguire*, 61 N. Y. 524.

In the third place, it appears here that, before a rule was entered upon appellee requiring him to show cause why he should not be committed for contempt, the appellant, as receiver, had intervened in the garnishment proceedings in Nebraska, and, upon his own application, had been made a defendant in those proceedings, and had been granted the power to appear and assert his rights <sup>642</sup> therein. The suits which appellee was required to dismiss were suits in which the receiver had voluntarily made himself a defendant. He had, of his own accord, submitted to the jurisdiction of the foreign court with a view of there contesting his rights. It has been held that, where a party has been guilty of a contempt of court by bringing suit against a receiver without

leave, the contempt is waived by the appearance of the receiver in the suit: *Mulcahey v. Strauss*, 151 Ill. 70.

Contempts have been classified into direct and constructive, the former being those committed in the presence of the court, or so near as to interrupt its proceedings, the latter being those which arise from matters not transpiring in court, but from refusal to obey its orders and decrees that are to be performed elsewhere. Interfering with property in the possession of a receiver is a constructive contempt: *Rapalje on Contempt*, secs. 22, 24. Contempts have been still further classified into criminal and civil, the former being acts in disrespect of the court or its process, or tending to bring it into disrepute, or obstruct the administration of justice; the latter being "those quasi contempts which consist in failing to do some thing which the contemner is ordered by the court to do for the benefit or advantage of another party to the proceeding before the court": *Rapalje on Contempt*, sec. 21. "If the contempt consist in the refusal of a party to do some thing which he is ordered to do for the benefit or advantage of the opposite party, the process is civil": *Phillips v. Welch*, 11 Nev. 187. In such case "the private party alone is interested in the enforcement of the order, and the moment he is satisfied the imprisonment terminates." A motion to commit for such a contempt may be answered by showing that the party complaining of it has waived it. "Waiver only applies where the contempt has arisen from breach of an order made in favor of any party—not, of course, to contempts of the court itself": *Oswald's Contempt of Court*, 113, 114.

648 In the case at bar the order of committal, because of refusal to dismiss the foreign suits, was made for the benefit and advantage of Palmer, the complainant in the creditor's bill. A receiver under a creditor's bill is not necessarily a trustee for the benefit of all the creditors, but for the benefit of the creditors in whose behalf he is appointed: *Young v. Clapp*, 147 Ill. 176. In his answer to the petition of the receiver, the appellee set up the order of the foreign court making the receiver a party to the foreign suits at his own request. We are inclined to think that the answer thereby showed, in connection with the other circumstances heretofore mentioned, a good defense to the motion or petition for an attachment, on the ground that the action of the receiver in submitting to the jurisdiction of the foreign court with a view of having

his rights determined there, amounted to a waiver of the contempt. It is true that the mere pendency of a suit in one state cannot be pleaded in bar or abatement of a second action in another state, even between the same parties, and for the same cause of action: *Allen v. Watt*, 69 Ill. 655. The reason for this rule is that the defendant would not be obliged to pay the money twice, since payment, at least, if not a recovery in the one suit, might be pleaded *puis darrein continuance* to the other suit; and if the two suits should ever proceed *pari passu* to judgment and execution, a satisfaction of either judgment might be shown in discharge of the other: *Bowne v. Jay*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99; *Embree v. Hanna*, 5 Johns. 101. But it is manifest that neither the rule, nor the reason for it, has any application here. That may be a good answer to a motion to commit for contempt which may not be a good defense upon the merits. In the *Sercomb* case the receiver had not intervened in the foreign suit when the application to commit for contempt was made; and therefore whatever was there said, inconsistent with the proposition that such an intervention as is shown under the circumstances of the present case can <sup>649</sup> be regarded as a waiver, must be modified to accord with the views here expressed. Where a court of equity is asked to proceed as for a contempt against a creditor, who seeks to reach by attachment or garnishment debts due to an insolvent debtor from persons residing out of the state, it is proper to inquire which of the parties has a paramount right or superior equity to those debts: *Dehon v. Foster*, 4 Allen, 545.

For the reasons here stated the judgment of the appellate court is affirmed, and the decree or order of the superior court of Cook county is reversed, and the cause is remanded to the latter court for further proceedings in accordance with the views here expressed.

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**FOREIGN RECEIVERS—RIGHTS OF RESIDENT CREDITORS.**—A receiver appointed in a foreign jurisdiction to take possession of the property of a corporation and manage its business, and who, in pursuance of his authority, has taken possession, within the jurisdiction of the court by which he was appointed, cannot hold such property against the claim of a citizen of California, who, upon finding the property in that state, in accordance with its laws has attached it: *Humphreys v. Hopkins*, 81 Cal. 551; 15 Am. St. Rep. 76, and extended note. The rights of nonresident attaching creditors are paramount in the courts of the state where the attachment is sued out to those of a receiver who was appointed by the court of another state,



and whose appointment antedates the writ: *Catlin v. Wilcox etc. Plate Co.*, 123 Ind. 477; 18 Am. St. Rep. 338, and note.

**FOREIGN RECEIVERS.—RIGHT TO MAINTAIN SUIT IN ANOTHER STATE:** Extended notes to *Straghan v. Hallwood*, 8 Am. St. Rep. 49, and *Alley v. Caspari*, 6 Am. St. Rep. 185.

**FOREIGN RECEIVERS.—JURISDICTION TO APPOINT.**—Where the parties to an action reside in one state the court of that state has power to appoint a receiver to take possession of the property of the defendant in another state, but it cannot cause such property to be removed so as to bring it within the jurisdiction of the state in which the court sits which has appointed the receiver: *Straghan v. Hallwood*, 30 W. Va. 274; 8 Am. St. Rep. 29, and note. A foreign receiver's power is only coextensive with that of the court appointing him, and while that court may authorize him to take possession of property in a foreign jurisdiction, the appointment can confer no legal power which he can exert over such property without the aid of the court in whose jurisdiction it is found: *Catlin v. Wilcox etc. Plate Co.*, 123 Ind. 477; 18 Am. St. Rep. 338, and note.

**RECEIVERS.—CONTEMPT.**—A citizen within the jurisdiction of the court appointing a receiver cannot attach funds in his possession in another state without its sanction, and by so doing, and refusing to dismiss his suit, he is guilty of, and may be punished for, contempt: *Sercomb v. Catlin*, 128 Ill. 556; 15 Am. St. Rep. 147. It is contempt of court for a third person to attempt to deprive a receiver of possession, whether by suit or by force: *Walling v. Meller*, 108 N. Y. 173; 2 Am. St. Rep. 400, and extended note.

**CORPORATIONS.—DOMICILE.—SITUS OF DEBTS.**—A domestic corporation, at all times, has its exclusive residence and domicile in the jurisdiction of its origin, and it cannot be garnished in another jurisdiction for debts owing to it by home creditors so as to make the attachment effectual against its creditor in the absence of jurisdiction acquired over his person: *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209; 34 Am. St. Rep. 448, and note. The courts of one state have jurisdiction to garnish a debt due to a non-resident of that state from a foreign corporation having an agent in the state where the suit is brought, and upon whom process may be served at the suit of one of its residents: *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316, and note. See, also, *Railroad v. Barnhill*, 91 Tenn. 395; 30 Am. St. Rep. 889, and note.



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## ADVERSE POSSESSION.

1. ADVERSE POSSESSION DEFENDS, to a great extent, upon the nature of the land and the use to which it may be put, and need be only such as to inform the community that the land is in the exclusive use and enjoyment of another than the true owner. *Downing v. Mayes*, 896.
2. ADVERSE POSSESSION TO DEFEAT THE TITLE OF THE OWNER of land must be hostile in its inception, and so continue, without interruption, for twenty years. It must be actual, visible, and exclusive, acquired and retained under claim of title inconsistent with that of the owner, but need not be under a rightful claim nor paper title. *Downing v. Mayes*, 896.
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1. WHEN NOTICE TO AGENT WILL BIND PRINCIPAL.—As to third parties, notice to an agent while acting within the scope of his authority is notice to the principal; but it must relate to the business or transaction as to which the agent is authorized to act. *Pennoyer v. Willis*, 594.
2. NOTICE.—An agent is presumed to have communicated to his principal matters intimately related to the very business he is conducting. *Enos v. St. Paul etc. Ins. Co.*, 796.
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4. WHEN KNOWLEDGE OF AGENT IS BINDING ON PRINCIPAL.—If a state board of commissioners, being authorized to lend the school fund, has an agent to whom is confided the duty of examining the title to land

offered as security for a loan, subsequent to the board's acceptance of the offer, to see that no change has occurred, and he is invested with discretion to withhold the money if he learns of any defect in the security offered, and, after direction from the board to make the loan, knowledge of an outstanding encumbrance is present in his mind, whether acquired before or during his agency, such knowledge is binding on the principal. *Pennoyer v. Willis*, 594.

5. **KNOWLEDGE OF AGENT AS NOTICE TO PRINCIPAL—EVIDENCE.**—If a state board of commissioners, being authorized to lend the school fund, has one agent to examine and certify as to title of land offered as security for a loan, and another to act as custodian of funds and securities offered for loans, and to pay over money when a loan is approved by the board, and the former agent makes a false certificate whereby loss occurs, evidence as to whether the latter person was such an agent as that his knowledge, at the time of the loan, and before the money was paid, of the existence of an encumbrance on the property, was notice to the board, and that it was, therefore, not misled by the false certificate, is competent, and should not be excluded. *Pennoyer v. Willis*, 594.
6. **WHEN KNOWLEDGE OF AGENT IS NOT BINDING ON PRINCIPAL.**—If a state board of commissioners, being authorized to lend the school fund, has an agent whose duty it is to act merely as custodian of the funds and securities offered for loans, but who has no discretion in the matter of making loans, or passing on the sufficiency of titles, he is not such an agent as that previous notice to him of an encumbrance on land offered as security for a loan of funds in the agent's hands will be notice to his principal. *Pennoyer v. Willis*, 594.
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8. **THE DECLARATIONS OF AN AGENT ARE INADMISSIBLE** to bind his principal unless they constitute an agreement he is authorized to make, or relate to and accompany an act done in the course of his agency. *Plymouth County Bank v. Gilman*, 786.
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See BANKS, 2; CORPORATIONS, 13; INSURANCE, 3, 4, 6; MUNICIPAL CORPORATIONS, 9-11.

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1. AN AMICUS CURÆ IS ONE WHO, as a stander by, when a judge is doubtful or mistaken in a matter of law, may inform the court. *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.
2. AN AMICUS CURÆ HAS NO CONTROL OVER THE SUIT, and no right to appeal, prosecute a writ of error, or institute other proceedings thereon. *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.
3. EXCEPTIONS TAKEN BY AN AMICUS CURÆ cannot avail his client on appeal. *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.

#### ANIMALS.

THE OWNER OR KEEPER OF A DOMESTIC ANIMAL WHICH IS VICIOUS AND PRONE OR ACCUSTOMED TO DO VIOLENCE, having knowledge of its disposition and habits, must, at his peril, keep it safely and securely, so that it cannot inflict injury, and cannot relieve himself from liability by proving that it escaped without any special negligence on his part. *Strouse v. Letts*, 122.

See HUSBAND AND WIFE, 3, 11.

#### APPEAL.

1. ASSIGNMENT OF ERROR that "the court erred in taking the case from the jury" is not a proper specification of error and presents no question for consideration on appeal. *Meador v. Lake Shore etc. Ry. Co.*, 384.
2. CONFLICTING TESTIMONY.—If the testimony of witnesses is conflicting it will not be considered on appeal. *Olfermann v. Union Depot R. R. Co.*, 433.



3. **OBJECTION THAT RECOVERY OF COSTS IS BARRED** because an injunction is violated in bringing suit cannot be raised for the first time on appeal. *Rabb v. Patterson*, 743.
4. **FINDINGS OF FACT** in a law case cannot be reviewed on appeal. *Heyward v. Farmers' Min. Co.*, 702.
5. **ASSIGNMENT FOR BENEFIT OF CREDITORS.**—It cannot be contended on appeal that a conveyance made by a husband to his wife is a general assignment for the benefit of creditors, with preferences, if the record fails to show that he, at the time, was insolvent, and does show that he had other property besides that conveyed to his wife. *Williams v. Harris*, 753.
6. **IN APPLYING THE LAW OF THE CASE** the record on a former appeal in the same action may be examined for the purpose of ascertaining what facts and questions were before the court. *Plymouth County Bank v. Gilman*, 786.
7. **LAW OF THE CASE.**—A question once decided on a former appeal, though by the territorial supreme court, becomes the law of the case, and will not be reversed upon a second appeal if the facts are substantially the same. *Plymouth County Bank v. Gilman*, 786.
8. **PLEADING.**—**ERROR OF COURT IN STRIKING OUT PART OF AN ANSWER** cannot be adjudged harmless because, on the trial of the cause, the evidence received by the court showed that the material allegations thus stricken from the pleading were false. *De Baker v. Southern California Ry. Co.*, 237.
9. **EVIDENCE, WAIVER OF OBJECTIONS.**—If, on the offering of the entries of a book in evidence, there is no objection interposed on the ground that it is not shown that such entries were contemporaneous with the facts recorded, this objection must be regarded as waived and cannot be interposed on appeal. *Railway Co. v. Murphy*, 202.
10. **ERROR IN ADMISSION OF EVIDENCE—REVERSAL OF JUDGMENT.**—If a wrong ruling is not invited, and the evidence admitted or excluded is material, the judgment will be reversed, unless the appellate tribunal can ascertain from the record, without weighing the facts as adduced by the evidence, that the wrong ruling did not prejudice the substantial rights of the plaintiff. *Plymouth County Bank v. Gilman*, 786.
11. **EVIDENCE.**—**OBJECTION TO ADMISSION** of evidence of such character that it can be avoided by other proof, to be available on appeal, must be specific, and not general. *Harrison v. Lewistown*, 893.
12. **TRIAL.**—**IMPROPER REMARKS OF COUNSEL IN ARGUMENT.**—In an action by an elderly woman against a street-car company for ten thousand dollars damages for injuries occasioned by defendant's negligence it is error to permit defendant's attorney to say to the jury in argument: "Here is plaintiff suing for ten thousand dollars for personal injuries, when, if she had lost her life through defendant's negligence, her representatives could only recover five thousand dollars"; but, as such remark relates to nothing but the measure of damages, the error is harmless where the jury find that plaintiff is not entitled to recover in any amount. *Ofermann v. Union Depot R. R. Co.*, 483.
13. **INSTRUCTIONS.**—An error in a particular instruction is harmless if all the instructions, taken together, fairly present the case to the jury. *Markovits v. Kansas City*, 498.
14. **DAMAGES, MEASURE OF—INSTRUCTIONS—PRESUMPTION ON APPEAL.**—If no instructions, in an action for damages, were asked or given as to the

measure of damages, it will be presumed on appeal that the trial court adopted the correct rule. *Heinrich v. St. Louis*, 490.

15. JURY TRIAL, HARMLESS ERROR.—If the defendant in a trial for murder is found guilty of manslaughter, an error of the court in defining the words "willfully and deliberately" is harmless. *Rogers v. State*, 154.
16. HARMLESS ERROR.—If it appears from all the evidence that a witness testified fully as to all matters involved in questions propounded to him, the fact that objections to certain of the questions were improperly sustained is harmless error. *Olvermann v. Union Depot R. R. Co.*, 483.
17. NONPREJUDICIAL ERROR.—Error in allowing the jury to separate for a few moments without the usual admonition is not prejudicial if the verdict was plainly right. *Kirby v. Western Union Tel. Co.*, 765.
18. TRIAL.—THE SUBMISSION OF SPECIFIC QUESTIONS to the jury is discretionary with the trial court, and its refusal is not error. *Boos v. St. Paul etc. Ins. Co.*, 796.
19. WITNESSES—NONEXPERTS.—It is not error to exclude the opinion of a witness as to whether a person acting unnaturally was feigning or not, where no prior acquaintance between such person and the witness was shown. *Boos v. St. Paul etc. Ins. Co.*, 796.
20. WAIVER OF ERROR.—He who goes to trial on the merits without objection to defects in the proceedings of the lower court thereby waives the right to raise such objection on appeal. *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.

See ACTIONS, 4; BANKS, 15; MARRIAGE AND DIVORCE, 2.

#### APPEARANCE

See ACTIONS, 3.

#### APPOINTMENT.

See OFFICERS; RECEIVERS, 2, 3.

#### APPROPRIATIONS.

See CONSTITUTIONS, 10, 11; MUNICIPAL CORPORATIONS, 24, 25; STATUTES, 14.

#### ARBITRATION.

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#### ARGUMENT OF COUNSEL.

See APPEAL, 13; TRIAL, 4, 5.

#### ARREST.

See HABEAS CORPUS.

#### ASSAULT.

CRIMINAL LAW.—AN ASSAULT USUALLY IMPLIES FORCE by the assailant and resistance by the assailed. If, however, the latter is made incapable of consent, the act may constitute an assault though she did not resist, but, on the contrary, assented. *People v. Verdegreen*, 234.

See RAPE.

ASSIGNMENT.

- A PERFECTED BOAT LIEN MAY BE ASSIGNED** like any other debt, and the assignee can enforce it in his own name as if he were the original contractor. *The Victorian*, 616.

See NEGOTIABLE INSTRUMENTS.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. PREFERENCES.—A debtor may lawfully prefer one creditor over another. *Kalmus v. Ballin*, 520.
2. PRIOR FRAUDULENT TRANSFERS—RIGHT OF ASSIGNEE TO ATTACK.—An assignee for the benefit of creditors is a trustee and entitled to attack a previous transfer of property, by his assignor in the interest of the creditors, to the extent necessary to satisfy their claims. *Kalmus v. Ballin*, 520.
3. PRIOR FRAUDULENT TRANSFERS—RIGHT OF CREDITOR TO ATTACK.—Until a creditor has presented his claim to the assignee he has no right to demand that the latter institute suit to set aside a prior transfer made by the assignor as fraudulent, and, until the claim is so presented, the creditor has no right to institute such suit in his own name on the ground that the assignee has neglected to act upon such demand. *Kalmus v. Ballin*, 520.
4. PRIOR FRAUDULENT TRANSFERS—DUTY OF ASSIGNEE TO ATTACK.—An application by creditors to an assignee for their benefit to institute proceedings to set aside prior transfers by the assignor as fraudulent can only be made by creditors to whom the assignee bears such relation as imposes upon him the duty to make such attack. *Kalmus v. Ballin*, 520.
5. PRIOR FRAUDULENT TRANSFERS—DUTY TO ATTACK.—An assignee is not bound, upon the request of a creditor, to institute suit at his own expense to set aside prior transfers made by his assignor as fraudulent, and his refusal to act, based on lack of funds, is not wrongful unless his excuse is false, or the creditor has offered, in good faith, to supply funds or indemnify him against loss. *Kalmus v. Ballin*, 520.
6. PRIOR FRAUDULENT TRANSFERS—RIGHT OF CREDITOR TO ATTACK.—A creditor who merely requests an assignee to institute suit to set aside prior transfers made by the assignor as fraudulent, without informing him of facts tending to show fraud and reasonable ground for contest, does not, upon the failure of the assignee to act, thereby establish his neglect or refusal, so as to entitle the creditor to institute suit in his own name. *Kalmus v. Ballin*, 520.
7. PRIOR FRAUDULENT TRANSFERS—RIGHT OF CREDITORS TO ATTACK.—If, after demand from a creditor upon an assignee for the benefit of creditors that the latter attack a transfer made by an assignor, such assignee refuses to make the attack, the creditor may then sue in his own name for the purpose of assailing and avoiding such transfer. *Kalmus v. Ballin*, 520.
8. PRIOR FRAUDULENT TRANSFERS—DUTY TO ATTACK.—The duty to attack prior fraudulent transfers of an assignor's property primarily devolves upon his assignee, who cannot be supplanted in the performance of such duty, unless he will not or cannot properly perform it. *Kalmus v. Ballin*, 520.

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## ASSIGNMENT OF ERRORS.

See APPEAL, 1.

## ASSOCIATIONS.

**BUILDING AND LOAN ASSOCIATIONS—FORFEITED STOCK OF BORROWER, WHETHER MUST BE APPLIED TOWARD THE SATISFACTION OF HIS DEBT.**—If a loan is made to a member of a building and loan association for the payment of which he pledges his stock therein, and, by reason of his subsequent default in payment of his dues, his stock becomes forfeited, he is not entitled to be credited on his loan with the value of his stock, nor with any payments made on account thereof. He has no right in such stock, or to the moneys which he has paid thereon, to which he would have been entitled had he made no loan. *Southern Building etc. Assn. v. Anniston Loan etc. Co.*, 138.

See ATTACHMENT, 1.

## ATTACHMENT.

1. **GARNISHMENT.—FUNDS IN THE HANDS OF A RELIEF ASSOCIATION** belonging to a beneficiary named in the certificate of a deceased member thereof are not subject to garnishment, if the rules of such association provide that the beneficiary is entitled to payment of such funds in person only upon the execution of a release, and such release has not in fact been executed. *Kinsloe v. Davis*, 689.
2. **EXEMPTIONS.—A CREDITOR WHO, TO AVOID THE EXEMPTION LAWS OF THE STATE, commences a garnishment in another, may be enjoined from further prosecuting such proceeding, and compelled to relinquish any moneys he may have already realized therefrom.** *Griggs v. Docter*, 824.

See CONFLICT OF LAWS; CONTEMPT; CORPORATIONS, 12; COUNTIES; DEVISE.

## ATTORNEY AND CLIENT.

See AMICUS CURIAE.

## BAGGAGE.

See RAILROADS, 8, 10.

## BAILEMENT.

1. **BAILER, DUTIES OF.**—A bailee to whom property is intrusted for safe-keeping must, by ordinary care and diligence, keep it safely, and, if it is lost through a failure to observe such duty, he is answerable. *Tombler v. Koelling*, 146.
2. **BAILEES, LIABILITY OF.**—The keeper of a bath-house who gives a check to a customer for valuables of the latter, and thereafter delivers them to another person who had stolen such check, is liable therefor, though the bailor had been guilty of negligence, enabling the thief to steal the check, if the bailee knew the property and the owner, and would not have delivered it on the check had he taken pains to look at the person by whom it was presented. *Tombler v. Koelling*, 146.

## BANKS.

1. **DUTY OF DEPOSITOR TO EXAMINE PASS-BOOK AND VOUCHERS.**—A depositor in a bank, who sends his pass-book to be written up, and receives it

back with entries of credits and debits, and his paid checks as vouchers for the latter, is bound personally, or by an authorized agent and with due diligence, to examine the pass-book and vouchers and report to the bank without unreasonable delay any errors which may be discovered in them. Failing to do so to the injury of the bank, he cannot afterward dispute the correctness of the balance shown by the pass-book, and is liable to the bank for any loss sustained by it. *First Nat. Bank v. Allen*, 80.

2. **LIABILITY OF DEPOSITOR FOR ACTS OF AGENT—NOTICE TO AGENT AS NOTICE TO PRINCIPAL.**—A depositor in a bank, who, after having his pass-book written up by the bank and receiving it back with entries of debits and credits and his paid checks as vouchers for the former, has such pass-book and vouchers examined by his agent, who has forged a part of such checks, is chargeable with the facts within the knowledge of such agent at the time of such examination, and which should have been communicated to the bank. *First Nat. Bank v. Allen*, 80.
3. **FORGED CHECKS—EVIDENCE.**—In an action by a depositor against a bank to recover the amount paid out by it on forged checks he may be asked to point out the genuine checks from a package partly genuine and partly forged, but his inability to do so is not conclusive against him. *First Nat. Bank v. Allen*, 80.
4. **FORGED CHECKS.**—A bank is bound to know the signature of its depositors, and the payment of a forged check, however skillfully executed, cannot be debited against the depositor if he is wholly free from neglect or fault. *First Nat. Bank v. Allen*, 80.
5. **FORGED CHECKS—LIABILITY OF BANK.**—A bank depositor cannot charge the bank with the full amount paid out on a forged check simply on the ground that the stubs on his check-book show no similar amount, if such book shows a stub corresponding in number but for a less amount, and it is also shown that the forger who had access to such book sometimes altered checks by inserting a larger amount than that shown by the stub, and the depositor is unable to distinguish between the genuine and forged stubs. *First Nat. Bank v. Allen*, 80.
6. **FORGED CHECKS—LIABILITY OF BANK.**—A bank which has repaid to a depositor the amount paid out on forged checks, after the depositor is guilty of negligence in failing to notify it of such forgeries, can set up such payment as a counterclaim in an action by the depositor to recover the amount paid by the bank on forged checks prior to his negligence. *First Nat. Bank v. Allen*, 80.
7. **FORGED CHECKS—MEASURE OF LIABILITY OF DEPOSITOR.**—Damages sustained by a bank through the payment of a forged check as the result of negligence by the depositor is the extent of the measure of the liability of the latter to the bank. *First Nat. Bank v. Allen*, 80.
8. **FORGED CHECKS—NEGLECT OF DEPOSITOR—LIABILITY OF BANK.**—A depositor furnished with monthly statements of his account with the bank cannot recover money paid by it on forged checks after he is chargeable with notice of such forgeries and fails to notify the bank thereof. *First Nat. Bank v. Allen*, 80.
9. **FORGED CHECKS—NOTICE TO DEPOSITOR—LIABILITY OF BANK.**—If several checks are forged by the agent of the depositor and paid by the bank, after he is chargeable with notice that his agent is guilty of such forgeries he is estopped from asserting a claim against the bank for the money paid on such checks by it. *First Nat. Bank v. Allen*, 80.

10. **FORGED CHECKS—LIABILITY OF DEPOSITOR.**—Though a depositor by his negligence has become liable for a forged check paid by his banker, yet, if the latter has recovered thereon from the forger, the liability of such depositor is only the amount remaining after deducting from the check the sum received from the forger. *First Nat. Bank v. Allen*, 80.
11. **CERTIFIED CHECK.**—The fact that the drawer of a check procures it to be certified by the bank on which it is drawn, before delivering it to the payee, does not relieve the latter from the necessity of making due presentation and giving due notice of default if he wishes to hold on to the liability of the drawer, but such certification does not discharge the drawer, where the bank becomes insolvent, if the payee shows proper diligence in presenting the check for payment and giving notice of its dishonor. *Cincinnati Oyster etc. Co. v. National etc. Bank*, 560.
12. **CERTIFIED CHECK.**—IF THE DRAWER OF A CHECK DELIVERS IT ALREADY CERTIFIED, the relations, duties, and obligations between him and the payee or holder are the same as if such check had not been certified. It is otherwise where the check is delivered without certification, and the holder, instead of presenting it for and receiving payment, presents and procures it to be certified. *Cincinnati Oyster etc. Co. v. National etc. Bank*, 560.
13. **NEGLECT OF COLLECTING BANK.**—If a bank, upon receiving a check from the payee for collection, sends it direct to the bank against which it is drawn, and the latter, although having sufficient funds of the drawer at the time it is received to pay it, neglects to do so, and subsequently fails before payment is made, the negligence of the collecting bank in so sending the check is such as to prevent any recovery by the payee against the drawer. The fact that the latter, through misrepresentations by the former, sends him a duplicate check, does not change the legal rights of the parties. *Wagner v. Crook*, 672.
14. **COLLECTIONS—NEGLECT.**—A bank intrusted with negotiable paper for collection must have it presented to the drawee for payment by a suitable agent who must be some party other than the drawee. A failure on the part of the collecting bank to perform this duty is negligence, for which, as between the drawer and payee, the latter must suffer. *Wagner v. Crook*, 672.
15. **NEGLECT AS TO COLLECTIONS—EVIDENCE.**—Upon an issue as to whether a bank has been guilty of negligence in failing to collect certain notes left with it for collection, the statement of its cashier that the failure to collect was the "fault" and "neglect" of the bank is not admissible, it being a mere expression of opinion. Such evidence is important, and the court, on appeal, cannot say that it was not prejudicial to plaintiff's case. *Plymouth County Bank v. Gilman*, 786.

## BILLS AND NOTES.

See **NEGOTIABLE INSTRUMENTS.**

## BILLS OF LADING.

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## BLANKS.

See **ALTERATION OF INSTRUMENTS; FILLING BLANKS.**

**BONDS.**

See CORPORATIONS, 2, 5; MUNICIPAL CORPORATIONS, 32.

**BOOKS OF ACCOUNT.**

See EVIDENCE, 8.

**BOUNDARIES.**

See EVIDENCE, 1.

**BOUNTIES.**

1. A BOUNTY signifies moneys paid, or a premium offered, to encourage or promote an object, or procure a particular act or thing to be done, or a sum or other thing, given generally by the government, to certain persons for some service they have done or are about to do the public. *Ingram v. Colgan*, 221.
2. THE DIFFERENCE BETWEEN A BOUNTY AND A REWARD is that the former applies to services where the act of many persons is desired, each of whom may act upon the offer and entitle himself to its benefits, without prejudicing the claims of another, while the latter applies to the case of a single service which can be performed but once, and the performance of which terminates the power of any other person to entitle himself to it by any subsequent act. *Ingram v. Colgan*, 221.
3. THE RIGHT TO A BOUNTY BECOMES VESTED when it has been earned by a full compliance with the conditions of the statute. *Ingram v. Colgan*, 221.

See CLAIMS, 2; LEGISLATURE, 4; STATUTES, 14, 15.

**BOYCOTT.**

See INJUNCTION, 1-4.

**BUILDING ASSOCIATIONS.**

See ASSOCIATIONS.

**BURDEN OF PROOF.**

See CRIMINAL LAW, 2; EVIDENCE, 5; NUISANCE, 1.

**BY-LAWS.**

See CORPORATIONS, 1-3.

**CANCELLATION.**

See DEEDS, 11.

**CARRIERS.**

1. LIABILITY OF WHEN CRASH.—The liability of a carrier as such does not terminate on the arrival of the goods at the point of destination and on placing them in the station-house of the carrier there situate, if the consignee has not had a reasonable opportunity to remove them after notice to do so or after a reasonable effort on the part of the carrier to give such notice. *Railway Co. v. Nevill*, 208.
2. DELIVERY TO, WHAT IS SO AS TO FIX LIABILITY.—When a shipper surrenders the entire custody of his goods to the carrier for immedi-

- ate transportation, who accepts them, his liability at once commences. It matters not how long nor for what causes he may delay putting the goods in course of transportation. *Railway Co. v. Murphy*, 202.
2. **LIABILITY FOR GOODS DESTROYED BY MOBS.**—Where there has been a total failure to deliver goods occasioned by the depredations or violence of mobs or rioters the carrier is answerable. *Railway Co. v. Newell*, 208.
  3. **STIPULATION AGAINST NEGLIGENCE.**—A carrier of passengers cannot, by contract, stipulate against liability for its own negligence. *Jones v. St. Louis etc. Ry. Co.*, 514.
  4. **NEGLIGENCE.**—BILL OF LADING LIMITING DAMAGES for loss to the value of the goods at the time and place of shipment is invalid and unavailing as against loss caused by the negligence of the carrier. In such case the measure of damages for the loss is the value of the goods at the point of destination, if accepted by the carrier for transportation on a through bill of lading and freight rate over a connecting line to the point of destination. *Ruppel v. Alleghany Ry.*, 666.
  5. **QUALIFIED LIABILITY.**—A common carrier cannot, by offering to carry under a qualified liability, constitute himself a common carrier with such liability only as he advertises to assume. *Kirby v. Western Union Tel. Co.*, 765.
  7. **DUTY, LIABILITY, AND LIMITATION THEREOF.**—A common carrier must accept and carry whatever is offered to him, at a reasonable time and place, and of a kind that he undertakes or is accustomed to carry, subject to the full liability of a common carrier, unless there is a special agreement limiting such liability. *Kirby v. Western Union Tel. Co.*, 765.
  8. **CONTRACT LIMITING LIABILITY, HOW PROVED.**—A special contract limiting the liability of a common carrier, except as to the "rate of hire" and "the time, place, and manner of delivery," must be proved by the signature of the shipper or sender. *Kirby v. Western Union Tel. Co.*, 765.
  9. **EXACTING AGREEMENT LIMITING LIABILITY.**—A common carrier cannot exact a special agreement limiting his liability as a condition precedent to the discharge of his duty. *Kirby v. Western Union Tel. Co.*, 765.
- See GAME LAWS; RAILROADS, 7-9; TELEGRAPH COMPANIES, 1, 2.

#### CATTLE-GUARDS.

See RAILROADS, 4-6.

#### CHARACTER.

See HOMICIDE, 3, 5.

#### CHATTEL MORTGAGES.

- A **CHATTEL MORTGAGE TAKEN IN THE NAME OF A PARTNERSHIP WITHOUT MENTIONING THE NAME OF EITHER OF ITS PARTNERS** is not on that account invalid. *Hendren v. Wing*, 218.

See FIXTURES, 4; GRANTS, 1.

#### CHECKS.

1. **NEGOTIABILITY.**—A check, with or without the words "value received," is negotiable. *The Famous Shoe etc. Co. v. Croswhite*, 424.



2. **FRAUD IN PROCURING—BONA FIDE HOLDER—EVIDENCE.**—Ordinarily, the holder of a check, who seeks to recover thereon, is not bound to account for its possession; but, when fraud in its procurement from the maker is shown, it devolves upon the plaintiff to prove that he is a *bona fide* holder. Such a showing entitles him to recover. *The Famous Shoe etc. Co. v. Crosswhite*, 424.
2. **RIGHTS OF BONA FIDE HOLDER NOT AFFECTED BY CUSTOM.**—It is no defense to an action on a check by a *bona fide* holder and indorsee thereof that the drawer, in delivering it to a person who represented himself as another, relied on the custom of the bank on which it was drawn of requiring the payee to be identified. *The Famous Shoe etc. Co. v. Crosswhite*, 424.

See **BANKS, 2-13; PAYMENT.**

### CHILDREN.

See **INFANTS.**

### CLAIMS.

1. **A CLAIM** is a demand of some matter as of right, made by one person upon another, to do or to forbear to do some act or thing as a matter of duty. *Ingram v. Colgan*, 221.
2. **CLAIMS AGAINST STATE, WHEN MUST BE PRESENTED TO THE BOARD OF EXAMINERS.**—If a statute provides that any person having a claim against the state may present it to the board of examiners, and that the controller of the state must not draw his warrant for any claim unless it has been approved by that board, another and subsequent statute providing that every person who shall kill a coyote shall be paid a bounty of five dollars out of the general fund, and that he shall make proof to the board of supervisors of the county in which the animal was killed, and deposit its scalp with them, and that there shall thereupon be issued to him a certificate of the clerk of such board showing the number of scalps so deposited, and that, on such certificate being presented to the controller, he may draw his warrant on the general fund for the sum named therein in favor of the person entitled thereto, that officer is not authorized to act until the claim has been presented to and approved by such board of examiners. *Ingram v. Colgan*, 221.

### COLLATERAL ATTACK.

See **JUDGMENTS, 3; PROCESS, 3.**

### COLLATERAL SECURITY.

See **NEGOTIABLE INSTRUMENTS, 4, 9.**

### COLLECTIONS.

See **BANKS, 12-15.**

### COMBINATIONS.

See **LABOR UNIONS, 2.**

### COMMISSIONERS.

See **AGENCY, 4-7; NOTICE; STATUTES, 2.**

## COMMON CARRIERS.

See CARRIERS.

## COMPOUNDING FELONY.

**CONTRACT, AGREEMENT NOT TO PROSECUTE A CRIMINAL CHARGE.**—To render a contract void, on the ground that its consideration was the suppression of a prosecution, the crime charged need not have been committed. *Insurance Co. v. Hull*, 571.

## COMPROMISE.

**RIGHT TO COMPROMISE** and settle an existing and asserted claim does not depend on the ultimate decision for or against its validity. *Bailey v. Philadelphia*, 691.

See INSURANCE, 8-10.

## CONFLICT OF LAWS.

**SUIT BY NONRESIDENT AGAINST MARRIED WOMAN—REMEDY—LEX FORI.** A nonresident creditor suing a married woman in this state is entitled to such remedies only as are afforded by the *lex fori*. Prior to the Missouri revision of 1889 a married woman was not subject, in that state, to the process of attachment. Hence, a nonresident creditor could not proceed against her by attachment for a debt contracted by her in another state prior to that time. *Ruhe v. Buck*, 439.

See CONTRACTS, 6; INSURANCE, 19-22; LIMITATIONS OF ACTIONS, 1.

## CONSIDERATION.

See CONTRACTS, 9.

## CONSPIRACY.

1. **CONSPIRACY AT COMMON LAW** was a combination between two or more persons to do an unlawful thing, or to do a lawful thing by unlawful means. *Longshore Printing Co. v. Howell*, 640.
2. **STRIKES AMONG WORKMEN** are not necessarily unlawful, though they may become both illegal and criminal by the means employed to enforce their objects. Employees may lawfully quit their service either singly or in a body, but if unlawful means are used to uphold or maintain a strike, or if the end to be attained is unlawful, then the strike itself is unlawful. *Longshore Printing Co. v. Howell*, 640.

See INJUNCTION, 3; LABOR UNIONS, 2.

## CONSTITUTIONAL LAW.

See CONSTITUTIONS; LEGISLATURE, 2-4; MUNICIPAL CORPORATIONS, 33; OFFICERS; STATUTES; TAXES, 3-6.

## CONSTITUTIONS.

1. **"LAW OF THE LAND"** means the common law, and the statute law existing in a state at the time of the adoption of a state constitution. *Mauldin v. City Council*, 23.
2. **FUNCTION OF DIFFERENT DEPARTMENTS OF GOVERNMENT.**—A constitution distributing the powers of government into three departments, to wit, legislative, executive, and judicial, gives to each department exclusive authority over the subject to be committed to it, and the legis-

lature cannot depute the performance to one department of a function essentially pertaining to another, but there are functions which are often performed by one of these departments of such a character that their performance does not necessarily belong to it, and, where such is the case, the authority of the department is not necessarily exclusive, and another department may be required to perform the same or a similar function. *Fox v. McDonald*, 98.

3. **INTERPRETATION.**—Constitutions, like statutes, are properly to be expounded in the light of conditions existing at the time of their adoption. Hence if, before the adoption of a constitution, there were local boards, tribunals, and officers exercising functions partly legislative, partly executive, and partly judicial in their nature, the fact that by such constitution the powers of government are classified into three departments, and the members of each department forbidden to exercise the powers belonging to another, will not prevent the legislature from authorizing the exercise by such boards, tribunals, or officers of the powers before possessed by them, though their exercise may involve functions which in their nature are not restricted to a single one of these departments. *Fox v. McDonald*, 98.
4. **INTERPRETATION OF LAWS.**—NEITHER CONSTITUTIONS NOR STATUTES SHOULD BE SO CONSTRUED as to have a retroactive effect, unless such intention is clearly expressed. *Kirby v. Western Union Tel. Co.*, 765.
5. **DECISIONS AND LAWS** existing and in effect previous to the adoption of a new state constitution, and not directly or by necessary implication denied therein, survive with full force and effect. *Mauldin v. City Council*, 723.
6. **LIBERTY INCLUDES THE RIGHT TO ACQUIRE PROPERTY**, and that means and includes the right to make and enforce contracts. *Ritchie v. People*, 315.
7. **THE RIGHT TO MAKE CONTRACTS IS INHERENT AND INALIENABLE.**—Any attempt to unreasonably abridge it is opposed to the constitution. *Ritchie v. People*, 316.
8. **A WOMAN IS ENTITLED** to the same rights under the constitution to make contracts with reference to her labor as are secured thereby to men. She is both a citizen and a person within the meaning of the fourteenth amendment of the constitution of the United States. With respect to an occupation not unsuitable to her sex the legislature cannot declare the number of hours per day or week in which she may be employed. *Ritchie v. People*, 315.
9. **ONE IS DEPRIVED OF PROPERTY WITHIN THE MEANING OF THE CONSTITUTION** if he is deprived of the right to make reasonable contracts. *Ritchie v. People*, 315.
10. **APPROPRIATIONS—TO AN APPROPRIATION WITHIN THE MEANING OF THE CONSTITUTION NOTHING MORE IS REQUISITE** than a designation of the amount and the fund out of which it shall be paid. It is not essential that the funds to meet the same be at the time in the treasury, and, in some instances, an act making an appropriation need not name the fund out of which payment is to be made. *Ingram v. Colgan*, 221.
11. **TO AN APPROPRIATION IT IS NECESSARY** that the amount of money appropriated shall be designated, and if, from the statute, it is not possible to ascertain the amount to be paid out, no valid appropriation is made. *Ingram v. Colgan*, 221.

See INTERSTATE COMMERCE, 4; JUDGMENTS, 11; LIBEL, 12, 13.

## CONTEMPT.

1. **RECEIVERS—ATTACHMENT AGAINST—CIVIL CONTEMPT.**—Interfering with property in the possession of a receiver by attaching it is a civil contempt, and a motion to commit for such contempt may be answered by showing that the receiver has waived it. *Holbrook v. Ford*, 917.
2. **CONTEMPT IN CIVIL CASES—RIGHTS OF PARTIES.**—A court of equity asked to proceed as for a contempt against a creditor, who seeks to reach, by attachment or garnishment, debts due to an insolvent debtor from persons residing out of the state, may properly inquire which of the parties has a paramount right or superior equity to such debts. *Holbrook v. Ford*, 917.
3. **WAIVER OF CONTEMPT.**—If a party has been guilty of contempt of court by bringing suit against a receiver without leave, the contempt is waived by the appearance of the receiver in the suit. *Holbrook v. Ford*, 917.

## CONTRACTORS.

See MASTER AND SERVANT, 2; MUNICIPAL CORPORATIONS, 29.

## CONTRACTS.

1. **CONTRACTS PARTLY WRITTEN AND PARTLY PRINTED** are controlled by the written part, in case the parts are apparently inconsistent, or there is reasonable doubt upon the sense or meaning of the whole. *Summers v. Hibbard*, 872.
2. **PURCHASE BY LETTER.**—An absolute offer by letter to purchase goods, accepted by letter in the same manner, forms an absolute and unconditional contract. *Summers v. Hibbard*, 872.
3. **PURCHASE BY LETTER.—PRINTED MATTER** on a letter head forms no part of the letter written thereon, and does not qualify an absolute contract of purchase arising from an offer contained in such letter. *Summers v. Hibbard*, 872.
4. **DUTY TO PERFORM.**—If a party by his positive contract creates a duty or charge upon himself, he becomes an insurer, and must make his contract good, either by performance or the payment of damages, and inevitable accident affords him no relief. *Summers v. Hibbard*, 872.
5. **CONTRACTS TO MANUFACTURE—DUTY TO PERFORM.**—The performance of an absolute contract to sell and deliver at a certain time goods to be manufactured by the seller is not excused by the breakage of the machinery of his manufactory. *Summers v. Hibbard*, 872.
6. **CONFLICT OF LAWS—LAW OF PERFORMANCE—LAW OF REMEDY.**—Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place of its execution. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought. *Rube v. Buck*, 439.
7. **A CONTRACT OPPOSED TO THE PUBLIC POLICY AND LAWS** of this state will not be enforced by its courts. *Rose v. Kimberly*, 855.
8. **AN ILLEGAL AGREEMENT MADE BY A PLAINTIFF** will not defeat him unless his cause of action is founded upon, or arises out of, such agreement. *Insurance Co. v. Hull*, 571.

9. **ILLEGAL, RETAINING CONSIDERATION.**—If a contract is void, because resting upon an illegal consideration, its repudiation by one party does not give the other the right to have restored to him what he parted with under it, nor does the retaining by the party of what he has received amount to a ratification of such contract by him. An illegal contract is not susceptible of ratification. *Insurance Co. v. Hull*, 571.
- See **CARRIERS**, 4, 8, 9; **COMPOUNDING FELONY**; **CONSTITUTIONS**, 7-9; **CORPORATIONS**, 4; **ESTOPPEL**, 2; **EVIDENCE**, 9; **FRAUD**, 1, 3; **LEGISLATURE**, 3; **MORTGAGES**, 4; **STATUTES**, 10.

### CONTRIBUTORY NEGLIGENCE.

See **MASTER AND SERVANT**, 12; **NEGLIGENCE**, 9, 10.

### CONVEYANCE.

See **DEEDS**.

### CORPORATIONS.

1. **BY-LAWS INCONSISTENT WITH THE GENERAL LAW.**—A corporation has no power to change or abrogate any provision of the law of its existence by means of a by-law. *Durkee v. People*, 340.
2. **A BY-LAW OF A CORPORATION AUTHORIZING HOLDERS OF BONDS ISSUED BY IT TO VOTE** at its elections is void if the general laws of the state confer that authority on stockholders only. *Durkee v. People*, 340.
3. **THE POWER TO RATIFY AN AGREEMENT OR BY-LAW** CANNOT extend to agreements or by-laws which a corporation has no power to make. Nor can the stockholders by their acquiescence or agreement ratify such action of the corporation so that they may not at any time refuse further acquiescence, and insist on their rights under the law. *Durkee v. People*, 340.
4. **NOTICE MUST BE TAKEN BY ALL PERSONS OF THE LIMITATIONS** upon the power of a corporation contained in the laws of the state. Therefore, no one can be regarded as deceived into the supposition that a corporation can make a contract into which it has sought to enter, if the power to make it is denied by law. *Durkee v. People*, 340.
5. **A CONTRACT STIPULATING THAT THE HOLDERS OF THE BONDS OF A CORPORATION MAY VOTE** at its elections must be disregarded if the constitution or laws of the state give such right to stockholders only. *Durkee v. People*, 340.
6. **STOCKHOLDER'S LIABILITY.**—UPON THE RENEWAL OR EXTENSION of the time of payment of a debt by a corporation a stockholder's liability continues, though he has before such renewal or extension parted with his stock. *Boice v. Hodge*, 569.
7. **PLEADING EXISTENCE.**—A complaint against a corporation must aver the fact of incorporation, or show that it is an artificial being capable of being sued, notwithstanding a statute making it unnecessary to prove its existence, unless the defendant avers in his answer that the plaintiff is not a corporation. *State v. Chicago etc. Ry. Co.*, 783.
8. **DISSOLUTION AND DESTRUCTION OF BY FAILURE TO EXERCISE CORPORATE RIGHTS AND FRANCHISES.**—If a corporation, by virtue of a judicial sale, is deprived of all its property and franchises, and thereafter continues for a quarter of a century to have no property or franchises, and no business or place of business, during all of which

time it fails to elect any officers or keep any office, it will be presumed to have surrendered, and the state to have accepted, its franchises, and to have terminated its corporate existence. *Combes v. Keyes*, 839.

9. JUDGMENTS AGAINST—EXTRATERRITORIAL EFFECT OF.—After a corporation has been adjudged insolvent in the state of its creation, and placed in the hands of a receiver, with full power to control and manage its affairs, and its officers, directors, agents, and attorneys have been enjoined from in any manner continuing its business, and from attempting to use its name, privileges, or franchises for any purpose, an officer of such corporation cannot, against the objection of such receiver, use its name to prosecute a writ of error in another state. *American Water Works Co. v. Farmers' Loan etc. Co.*, 285.
10. A JUDGMENT RENDERED AGAINST A CORPORATION AFTER ITS DISSOLUTION, or after a surrender by it and an acceptance by the state of its corporate rights and franchises, is void. A defunct corporation cannot be brought into court by any process whatever. *Combes v. Keyes*, 839.
11. PRACTICE.—IN AN ACTION AGAINST A DISSOLVED OR DEFUNCT CORPORATION it is proper for one who has been its secretary to give and inform the court of the facts which had worked the corporate dissolution and death. *Combes v. Keyes*, 839.
12. TRUST FUND DOCTRINE.—A CREDITOR, KNOWING A CORPORATE DEBTOR TO BE INSOLVENT, may attach its property, and, by so doing, obtain a lien and preference which other creditors cannot compel him to surrender or share with them. *Ballin v. Merchants' Exchange Bank*, 534.
13. FOREIGN, DOING BUSINESS WITHIN THE STATE, WHAT IS NOT.—The taking of a single mortgage in this state by a foreign corporation, to secure a pre-existing debt for goods sold in another state, is not doing business within the state within the meaning of a statutory or constitutional provision prohibiting the doing of such business, except when the corporation maintains one or more places of business within the state and an authorized agent on whom process against it may be served. *Florsheim etc. Dry Goods Co. v. Lester*, 162.
14. BY WHAT LAW GOVERNED.—A corporation is governed by the laws of the state or sovereignty under and by virtue of which it has been created. Though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers whenever it undertakes to exercise them. *American Water Works Co. v. Farmers' Loan etc. Co.*, 285.
15. A CORPORATION DWELLS WITHIN THE STATE OF ITS CREATION, AND CANNOT MIGRATE to another, though it may there contract and exercise such other corporate franchise as the laws of that state permit. *Combes v. Keyes*, 839.
16. DOMICILE—SITUS OF DEBTS.—A foreign corporation has its domicile in the state from which it derives its existence, and the situs of its debts is in that state. *Hollbrook v. Ford*, 917.

See CREDITOR'S SUIT; EQUITY, 2; LIBEL, 1; MANDAMUS.

#### COSTS.

COSTS ARE NOT MATTER OF RIGHT IN EQUITY, but may be awarded or withheld in the discretion of the chancellor. *Pile v. Padrick*, 677.

See APPEAL, 3; JUDGMENTS, 16.

COTENANCY.

See PARTITION; PARTNERSHIP, 14.

COUNTIES.

A COUNTY IS NOT LIABLE for damages caused by its wrongful attachment of property. *Reed v. Howell County*, 488.

COURTS.

See AMICUS CURIAE.

COVENANTS.

CONVEYANCES.—COVENANTS WHICH ARE CONNECTED WITH THE ESTATE RUN WITH THE LAND, and vest in point of benefit and liability in an assignee. *Hickey v. Lake Shore etc. Ry. Co.*, 545.

CREDITOR'S SUIT.

CREDITOR'S BILL FILED AGAINST A FOREIGN CORPORATION, without service of process thereon, creates no lien upon debts due thereto by foreign creditors. *Helbrook v. Ford*, 917.

CRIMINAL LAW.

1. ALIBI.—AN instruction that if defendant has failed to establish his alibi, through the perjury or want of recollection of his witnesses, it is a circumstance against him is erroneous, because it may make him suffer for the perjury of others. *Prince v. State*, 28.
2. ALIBI.—AN instruction that the burden of proof is on the accused to establish his alibi "to your satisfaction" is erroneous in omitting the word "reasonable." *Prince v. State*, 28.
3. REASONABLE DOUBT.—ALIBI.—The whole evidence, including that relating to an alibi, should be duly considered and weighed, and if, after such consideration, the jury have a reasonable doubt of defendant's guilt, arising out of any part of the evidence, they must acquit. *Prince v. State*, 28.
4. ALIBI.—REASONABLE DOUBT.—Whenever the evidence introduced to support the defense of an alibi creates a reasonable doubt of the defendant's guilt he is as much entitled to an acquittal as if the reasonable doubt had been created or produced by any other legitimate evidence. *Prince v. State*, 28.
5. INJURING TREES.—After persons engaged in constructing a telegraph line on a public highway are informed by the owner of abutting lands of his ownership of such lands and of the trees growing thereon in the highway, and he protests against their interfering or injuring such trees, but they nevertheless choose to go on and do the injury and are subjected to a criminal prosecution therefor, it is for the jury to say whether or not they acted heedlessly, recklessly, and maliciously, and if so, they may be found guilty. *Daily v. State*, 578.
6. JUDGMENT IN CRIMINAL CASES, SUSPENDING EXECUTION OF.—A court cannot suspend the execution of its sentence pronounced in a criminal case, except as an incident to the review of the case upon writ of error, or upon other well-established legal grounds. Therefore, if it does by its order, after sentencing the accused to imprisonment for a term specified, purport to suspend such imprisonment until the further order of

the court, it cannot, after the expiration of the term specified, direct his imprisonment, though during such term he was at liberty, and suffered no imprisonment whatever. *In re Webb*, 846.

7. **FINES.**—PARTY CANNOT COMPLAIN that a fine assessed against him is less than the minimum provided for by ordinance. *Harrison v. Lewis-town*, 893.

See ASSAULT; COMPOUNDING FELONY; GAME LAWS; HOMICIDE; LARCENY; RAPE; TRIAL, 1, 6; WITNESSES, 4, 5.

### CURTESY.

**TENANCY BY THE CURTESY.**—On the death of a wife holding an equitable estate her husband becomes tenant by the curtesy thereof. *Ogden v. Ogden*, 151.

### CUSTOM.

See CHECKS, 3.

### DAMAGES.

1. **DAMAGES AS FOR PERMANENT INJURIES** CANNOT be allowed unless it is reasonably certain from the evidence that the injury will be permanent. It is not sufficient that there be a reasonable probability that the injury will be permanent and lasting. *Black v. Milwaukee etc. Ry. Co.*, 849.
2. **CONTRACT TO MANUFACTURE—FAILURE TO PERFORM—MEASURE OF DAMAGES.**—If a vendor in a contract to manufacture and deliver goods at a given time fails to perform his agreement, the vendee may recover the difference between the contract price and the market price, without purchasing the goods elsewhere. *Summers v. Hibbard*, 872.
3. **CONTRACT TO MANUFACTURE—POSTPONEMENT OF DELIVERY—MEASURE OF DAMAGES.**—If the delivery of goods due under a contract for their manufacture is postponed by agreement, the measure of damages for non-delivery is the difference between the contract price and the market price at the time the goods are deliverable under the contract to postpone. If the time of delivery is postponed indefinitely by agreement, the measure of damages for failure to deliver is the difference between the contract price and the market value at a reasonable time after demanding performance. *Summers v. Hibbard*, 872.

See APPEAL, 13; CARRIERS, 5; MUNICIPAL CORPORATIONS, 39-41; NEGLIGENCE, 6; RAILROADS, 16.

### DEATH.

See EVIDENCE, 4; NEGLIGENCE, 6-8.

### DEBRIS.

See WATERS, 9-12.

### DEBTOR AND CREDITOR.

1. **PAYMENTS—APPLICATION OF.**—A debtor may apply moneys paid by him to either of several obligations; but, failing to direct such application at the time of payment, his creditor may at any time prior to judgment apply it to such claim as he sees fit. *Baum v. Trantham*, 697.
2. **MARSHALING SECURITIES.**—If ONE CREDITOR CAN RESORT TO TWO FUNDS and another to one only, the latter can compel the former to resort to the fund which the latter cannot touch unless they have not the same



creditor, or the two funds are not the property of the same person. *Gotsian v. Shakman*, 820.

2. **MARSHALING SECURITIES.—THE FACT THAT A CREDITOR HAVING TWO SECURITIES MUST SUFFER SOME DELAY** if compelled to exhaust one of them before resorting to another does not constitute a sufficient cause for the refusal of the application of another creditor, having but one security, to compel a resort to the security in which he has no interest. *Gotsian v. Shakman*, 820.

**See ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; ESTOPPEL, 6; FRAUDULENT CONVEYANCES; INSURANCE, 2.**

### DECEDENTS' ESTATES.

**See JUDGMENTS, 4.**

### DECLARATIONS.

**See AGENCY, 8, 9; RAILROADS, 1, 2.**

### DEEDS.

1. **CONVEYANCES—FORM—INTENTION.—A conveyance need not follow any exact form, provided it expresses an intention to convey.** *Cross v. Weare Commission Co.*, 902.
2. **THE ACCIDENTAL OMISSION OF A SEAL** from a deed does not affect its validity. *Heyward v. Farmers' Min. Co.*, 702.
3. **CONVEYANCES—GRANTEE NOT SIGNING DEED.—**When a grantee accepts a deed and goes into possession under it he is bound by the conditions contained in the deed as effectively as if he had signed and sealed the instrument. *Hickey v. Lake Shore etc. Ry. Co.*, 545.
4. **DESCRIPTION.—**If a deed describes land by metes and bounds, and then states that it is all of a tract of land (giving another description), and the two descriptions are not synonymous, effect will be given to the larger and less restricted description, and the result will be that the deed will operate as a conveyance of the land contained in both descriptions. *Lake Erie etc. R. R. Co. v. Whitham*, 355.
5. **CONVEYANCES—CONSTRUCTION.—**Conveyances which cannot operate as that species of conveyance indicated by the letter are held to operate in some other form, so as to effectuate the object which, from the whole instrument and the circumstances and condition of the title, the parties appear to have intended. *Cross v. Weare Commission Co.*, 902.
6. **DELIVERY OF A DEED IS PRESUMED TO HAVE BEEN ON THE DAY OF ITS DATE,** though it was subsequently acknowledged. Nor is this presumption rebutted by evidence that it did not come to the personal possession of the grantee until after it was acknowledged, if it was procured by an attorney acting for him in another county. *Lake Erie etc. R. R. Co. v. Whitham*, 355.
7. **THE DELIVERY OF A DEED DATED ON THE DAY THE SUIT WAS BROUGHT** is prima facie established to have been before such suit was commenced, by the undisputed testimony of the grantee that it was delivered before the suit was commenced, though he further testifies that he was in another county on that day, and does not clearly show how he knew the precise moment of the commencement of the action, and reached the conclusion that it was after the delivery of the deed. *Lake Erie etc. R. R. Co. v. Whitham*, 355.

8. CONVEYANCES—COVENANTS AND CONDITIONS WHICH ARE BINDING ON THE GRANTEE AND HIS SUCCESSORS IN INTEREST.—If a conveyance declares that it is made subject to the condition that the grantee, his heirs and assigns, shall make and maintain a good and sufficient fence at certain points named therein, and that this condition shall be perpetually binding on the owners of the lands granted, and the grantee and his assigns do not comply with such condition, the grantor may himself construct or repair the fence stipulated for, and maintain an action for reimbursement against the original vendee and his grantees to charge each with the expense of that portion of the fence upon the lands owned by him. *Hicky v. Lake Shore etc. Ry. Co.*, 545.
9. CONVEYANCES—COVENANTS AND CONDITIONS, DIVISIBILITY OF LIABILITY UPON.—If a condition is annexed to a grant that the grantee, his heirs and assigns, will maintain a fence upon certain lands designated, and the grantee conveys portions of the premises, his liability as to such portions terminates, and his grantees are liable for the respective portions owned by him. *Hicky v. Lake Shore etc. Ry. Co.*, 545.
10. A GRANTEE OF LAND IS NOT OBLIGED TO PAY A MORTGAGE thereon which constitutes no part of the consideration for the purchase, and was not made in good faith for a bona fide indebtedness, although the grantee took a deed expressed to be subject to encumbrances. *Robinson Bank v. Miller*, 883.
11. THE DESTRUCTION AND CANCELLATION OF A DEED, after it has been delivered, does not revert the title in the grantor. *Potter v. Adams*, 478.
12. QUITCLAIM DEED—BONA FIDE PURCHASER.—One holding under a quitclaim deed is not a bona fide purchaser without notice. *Wood v. Holly Mfg. Co.*, 56.
- See ACKNOWLEDGMENT; EASEMENTS; EVIDENCE, 7; FRAUDULENT CONVEYANCES, 4.

## DEFINITIONS.

- Amicus curia.* *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.
- "Appropriate department." *Bailey v. Philadelphia*, 691.
- Bounty. *Ingram v. Colgan*, 221.
- Claim. *Ingram v. Colgan*, 221.
- Conspiracy. *Longshore Printing Co. v. Howell*, 640.
- Gift. *Ingram v. Colgan*, 221.
- "Law of the Land." *Mauldin v. City Council*, 723.
- Liberty. *Ritchie v. People*, 315.
- "Original package." *State v. Parsons*, 457.
- "Package." *State v. Parsons*, 457.
- Peddler. *State v. Parsons*, 457.
- Police power. *Champer v. Greencastle*, 390.
- Proximate cause. *Dickson v. Omaha etc. Ry. Co.*, 424.
- "Taking." *Willamette Iron Works v. Oregon Ry. etc. Co.*, 620.
- "To pack." *State v. Parsons*, 457.

## DELIVERY.

See CARRIERS, 2; DEEDS, 6, 7.

DEVISE.

**EXECUTION, WITHDRAWING PROPERTY FROM.**—A CONDITION IN AN ABSOLUTE DEVISE OF PROPERTY that it shall never be subject to any liability, attachment, judgment, or execution against the devisee is void. *Van Osdel v. Champion*, 864.

DISCLAIMER.

See ESTOPPEL, 3.

DISSOLUTION.

See CORPORATIONS, 8-11.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

See HUSBAND AND WIFE, 6; PARTNERSHIP, 5, 10.

EASEMENTS.

**DESTRUCTION OF PROPERTY SUBJECT TO.**—A reservation in a deed of such a right of way over the stairs and in the hall of a building as may be necessary to the proper use and occupancy of the upper story thereof does not create an easement or interest in the soil, but a mere license or right, which is extinguished by the destruction of the building without the fault of its owner. *Shirley v. Crabb*, 376.

See INJUNCTIONS, 9; PRIVATE WAYS; TRESPASS, 1.

EJECTMENT.

**TITLE FROM COMMON SOURCE.**—If a plaintiff files an affidavit, showing from whom he claims title, and stating that he understands defendant to claim from the same source, and the defendant does not controvert such affidavit, it will be sufficient for the plaintiff to trace title from the common source thus designated by him. *Lake Erie etc. R. R. Co. v. Whitlam*, 355.

See FRAUDULENT CONVEYANCES, 3, 4.

ELECTRIC.

See RAILROADS, 22, 23.

EMINENT DOMAIN.

**TAKING OF PROPERTY, WHAT IS NOT.**—An ordinance authorizing the construction of a levee within the bed of a watercourse in a city upon a plan which must result in the obstruction of the stream, and the casting of its waters against and upon the lands of neighboring proprietors to their damage, does not constitute a taking of the property of such proprietors, or of any of them, and the ordinance, therefore, does not appear to be invalid upon its face by reason of its failure to provide compensation in advance of the doing of the contemplated work. *De Baker v. Southern California Ry. Co.*, 237.

See INJUNCTIONS, 8, 9.

## EQUITY.

1. EQUITY HAS JURISDICTION TO SET ASIDE A FORMER JUDGMENT OR DECREE FOR PERJURY OR FRAUD only in those cases where the perjury or fraud consists of extrinsic, collateral acts, not examined and determined in the former action. *Friese v. Hummel*, 610.
2. JURISDICTION OVER ELECTION OF CORPORATE OFFICERS.—A court of equity has no jurisdiction in a direct proceeding to determine the validity of an election of directors or officers of a private corporation, or the right to such office. If the question arises incidentally or collaterally in a suit properly brought for another purpose the court may decide it. *Kean v. Union Water Co.*, 538.
3. A PARTY SEEKING IN EQUITY TO DIVEST OTHERS OF THE LEGAL TITLE to land may be required to repay advances for the purchase and improvement of the land. *Galbraith v. Tracy*, 867.
4. RULE AND PRECEDENTS.—A court of equity must be guided by established rules and precedents. It has no more right than has a court of law to act upon crude notions of what is right in a particular case. *Sell v. West*, 508.

See COSTS; MORTGAGES, 5; MUNICIPAL CORPORATIONS, 5.

## ESTATES.

See COVENANTS; MERGER.

## ESTOPPEL.

1. A PARTNER WHO STATES at the time of the execution of a mortgage by his copartner upon the firm property that the latter holds the whole title thereto is estopped from claiming that the mortgage does not convey the entire interest, and his judgment creditor, with notice, is bound by such estoppel. *Cross v. Weare Commission Co.*, 902.
2. A CONTRACT VOID AS AGAINST A STATUTE cannot become valid and operative through an estoppel. *Durkes v. People*, 340.
3. PRACTICE.—ONE DISCLAIMING THAT evidence of possession offered by him is for the purpose of proving title is bound by the disclaimer, and is not entitled to a charge to the effect that the property has been adversely held by him. *Chloupek v. Perotka*, 858.
4. BY ACCEPTING A CONVEYANCE AS A SUBSTITUTE FOR AND A CORRECTION OF a prior conveyance, the grantee and his heirs are estopped from claiming title under such prior conveyance as to lands not included in the substitute conveyance. *Chloupek v. Perotka*, 858.
5. TITLE TO LAND MAY BE CONVEYED BY ESTOPPEL, and creditors cannot set up the statute of frauds to defeat such an estoppel against their debtor. *Cross v. Weare Commission Co.*, 902.
6. DEED, LOST OR DESTROYED—ESTOPPEL FROM SETTING UP TITLE.—CONTRIVING TO DEFRAUD CREDITORS.—A grantee, who has destroyed or consented to the destruction of his unrecorded deed with the intention of thereby revesting the title in the grantor, will be estopped from setting up title under such deed; and those claiming under him will also be estopped, unless the destruction of the deed was a contrivance to defraud the creditors of the grantee. *Potter v. Adams*, 478.
7. ESTOPPEL IN FAIR.—If one, by his words or conduct, voluntarily causes another to believe in the existence of certain facts, and induces him to

act upon that belief so as to change his previous position, the former is estopped to aver a different state of facts. *Robinson Bank v. Miller*, 883.

See INSURANCE, 6, 7.

### EVIDENCE.

1. JUDICIAL NOTICE MAY BE TAKEN OF THE BOUNDARIES OF A CITY as described in the act of its incorporation, and also of the fact that a river flows through such city from north to south, and near its eastern limits. *De Baker v. Southern California Ry. Co.*, 237.
  2. PRESUMPTION.—A material fact capable of proof but not proved is presumed not to exist. *Wood v. Holly Mfg. Co.*, 56.
  3. EVIDENCE—SILENCE—PRESUMPTION.—The silence of a party to an action, charged with a damaging fact brought out in evidence, is not an admission of its truthfulness. It simply creates an unfavorable presumption against him. *Enos v. St. Paul etc. Ins. Co.*, 796.
  4. PRESUMPTION OF DEATH ARISES from the absence of a person from his domicile without being heard from for seven years. *Bardin v. Bardin*, 791.
  5. BURDEN OF PROOF.—If a defendant denies all of the allegations of plaintiff's complaint the burden of proof is on plaintiff to establish all of his averments. *Tennessee Coal etc. Co. v. Hamilton*, 48.
  6. PAROL EVIDENCE IS ADMISSIBLE FOR THE PURPOSE OF PROVING THAT A RELEASE WAS SIGNED WITHOUT KNOWLEDGE of its contents, and without any intention on the part of the signer to execute an instrument of that character. *Lord v. American etc. Accident Assn.*, 815.
  7. DEED, LOST OR DESTROYED.—SECONDARY EVIDENCE is admissible to prove the existence, loss, and contents of an unrecorded deed, which has been lost or destroyed by accident or mistake; but not where it has been voluntarily destroyed by the grantee for the purpose and with the intention of revesting the title in the grantor. *Potter v. Adams*, 478.
  8. THE BOOKS OF A DECEASED PARTY to an action are admissible in evidence in an action in favor of his executor if it is shown that they had been correctly kept, and that the entries therein were in the handwriting of the deceased and were made contemporaneously with the facts recorded. *Railway Co. v. Murphy*, 202.
  9. EVIDENCE TO PROVE EFFECT OF INTOXICATION UPON MENTAL CAPACITY.—In an action to recover damages for taking advantage of plaintiff's intoxicated condition for the purpose of obtaining from him a contract for the sale of his property at an inadequate price, evidence that, a few days prior to the making of the contract and when sober, he had placed upon such property a value widely variant from that at which it was sold, is admissible because it tends to show the extent to which intoxication had affected his judgment. *Baird v. Howard*, 550.
- See APPEAL, 2, 9-11; BANKS, 15; HOMICIDE, 2; JUDGMENTS, 10; LIBEL, 4; REAL PROPERTY, 1; TRIAL, 1, 2.

### EXCAVATIONS.

See MUNICIPAL CORPORATIONS, 46.

### EXECUTION.

1. POSTPONEMENT OF SALE.—FRAUD ARISES AS A LEGAL CONCLUSION from the consent of a creditor to a postponement of sale under his execution,

although he is actuated only by motives of kindness and leniency toward his debtor, and gives a preference to a junior execution levied during the pendency of such postponement. *Sweetser v. Matson*, 911.

2. **WHEN DORMANT.**—An execution creditor, by consenting to a postponement of sale under his execution to allow his debtor to settle with his creditors, thereby loses his priority of lien as against a junior execution levied during such postponement, although consent to such postponement is granted through kindness, without intent to hinder or defraud creditors. *Sweetser v. Matson*, 911.

See DEVISE.

## EXECUTORS AND ADMINISTRATORS.

See EVIDENCE, 8; PARTNERSHIP, 7, 8.

## EXEMPTIONS.

See ATTACHMENT, 2; PROCESS, 1.

## EXPERTS.

See APPEAL, 19; WITNESSES, 7-18.

## FEEES.

See WITNESSES, 7, 8.

## FEMALES.

See STATUTES, 11, 12.

## FENCES.

See DEEDS, 8, 9; RAILROADS, 12-14.

## FILLING BLANKS.

**BLANKS IN INSTRUMENT, FILLING OF FOR TOO LARGE A SUM.**—If the promisee in an instrument is authorized to fill a blank therein by inserting the amount due him, but he inserts a larger sum, such instrument is void. *Green v. Sneed*, 119.

See ALTERATION OF INSTRUMENTS.

## FINDINGS.

See APPEAL, 4.

## FINES.

See CRIMINAL LAW, 7; JUDGMENTS, 16.

## FIRE LIMITS.

See INJUNCTION, 6; MUNICIPAL CORPORATIONS, 20-22.

## FIXTURES.

1. **ONE OF THE REQUISITES** to convert a chattel into a part of the realty is the intention of the party making the annexation to make a permanent accession to the freehold. This is implied, if he erects such structures as ordinarily attach to the land without agreement to the contrary with the owner. *Wood v. Holly Mfg. Co.*, 56.

2. **WHEN DEEMED PERSONALTY.**—Many things ordinarily considered fixtures may become, to all intents and purposes, personal property, as between the parties interested in the realty and fixtures, by agreement between them to that effect. *Cross v. Weare Commission Co.*, 902.
3. **AGREEMENT CHANGING CHARACTER OF PROPERTY.**—In cases where parties may agree among themselves to treat fixtures as personalty, such agreement cannot change the character of the property as to third persons. *Cross v. Weare Commission Co.*, 902.
4. **CHARACTER OF PROPERTY NOT CHANGED BY AGREEMENT.**—If a chattel mortgage is executed upon machinery or buildings or articles after they have been so attached to the realty as to become part of it, and the lease or other instrument of title under which the mortgagor holds does not authorize a removal of such articles, and removal cannot be made without injury to the realty or the fixture, an agreement by the parties that the articles shall be treated as personalty does not have the effect of preserving their character as such. *Cross v. Weare Commission Co.*, 902.
5. **THE RESERVATION BY AGREEMENT OF THE RIGHT TO REMOVE** machinery or other erections, which in their removal do not materially injure the premises, prevents them from becoming fixtures. *Wood v. Holly Mfg. Co.*, 56.

See GRANTS, 1.

#### FLOODS.

See WATERS, 15.

#### FORBEARANCE.

See NEGOTIABLE INSTRUMENTS, 9.

#### FORFEITURE.

See INSURANCE, 11-15.

#### FORGERY.

See BANKS, 2-10.

#### FRANCHISES.

See CORPORATIONS, 8.

#### FRAUD.

1. **FRAUD IN CONTRACTING WITH AN INTOXICATED OR INCOMPETENT PERSON.** To secure possession of property by means of a contract made with its owner by one who at the time knows him to be incapable of entering into a contract constitutes a fraud. *Baird v. Howard*, 550.
2. **PROOF REQUIRED.**—If the facts and circumstances surrounding the case and directly proved are such as would lead a reasonable man to the conclusion that fraud in fact existed, this is all the proof which the law requires. *Williams v. Harris*, 753.
3. **ACTION TO RECOVER DAMAGES FOR PROCURING A CONTRACT BY—REMISSION NOT NECESSARY.** — If a person knowingly and fraudulently takes advantage of an owner's intoxication to procure a contract from him for the purchase of his property at an inadequate price which he knows the owner would not accept if sober, and thereby on the pay-

ment of such price he obtains such contract and possession of the property, the owner may maintain an action to recover the damages sustained by him without first rescinding the contract and offering to return the consideration received for it. *Baird v. Howard*, 550.

See CHECKS, 2; EQUITY, 1; EXECUTION; JUDGMENTS, 7-9; LARCENY, 2, 3; WILLS, 8.

### FRAUDULENT CONVEYANCES.

1. **PRESUMPTION.**—Insolvency of the debtor at the time the suit is brought to set aside his conveyance as fraudulent does not carry with it the presumption that such insolvency existed prior to that time, and extended back to the time when the conveyance was made. *Nevers v. Hack*, 380.
2. **ALLEGATIONS AND PROOF.**—To avoid a fraudulent conveyance it must be both alleged and proved that at its execution and also when the suit was brought the debtor did not have sufficient property, subject to execution, to pay his debts. *Nevers v. Hack*, 380.
3. **FRAUD MAY BE PROVED IN EJECTMENT.**—A purchaser at a sheriff's sale made by virtue of a creditor's judgment may, in an action of ejectment, defeat a deed made to defraud creditors, by proof of its fraudulent character. *Potter v. Adams*, 478.
4. **ISSUE OF FRAUD MAY BE TRIED IN EJECTMENT.**—If a grantee destroys his unrecorded deed for the purpose of revesting title in his grantor, and has the latter execute a deed in trust for his wife, with the intention of hindering, delaying, and defrauding his creditors, the whole transaction is void at law as well as in equity, and the issue may be tried in an action of ejectment, as well as in a suit in equity, to set aside the second deed on the ground of fraud. *Potter v. Adams*, 478.
5. **HUSBAND AND WIFE—RIGHT TO PREFER WIFE AS A CREDITOR.**—If the wife is a creditor of her husband in good faith, he has the right to secure or pay her as he would any other creditor. He may even convey property to her for that purpose, with a fraudulent intent as to other creditors, and the title will not be defeated unless she had knowledge of such intent. *Williams v. Harris*, 753.
6. **HUSBAND AND WIFE—TRANSFERS OF PROPERTY.**—A transfer of a considerable portion of property by a debtor, when in failing circumstances, to his wife, and immediately after acquiring it, may, unexplained, raise a presumption of fraud. But all taint of suspicion may be removed by showing the utmost good faith in the transaction. *Williams v. Harris*, 753.
7. **RIGHT OF CREDITORS TO ATTACK.**—Creditors acquire a status to challenge a transfer of property by their debtor as fraudulent, only by having first presented their claims to his assignee, or by obtaining a judgment or other lien, which, but for the transfer, would affect the property. *Kalmus v. Ballin*, 520.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 2-3.

### FUGITIVES.

See HABEAS CORPUS.

### GAME LAWS.

1. **STATUTES—GAME LAWS, CONSTRUCTION OF AS TO GAME KILLED BEYOND THE STATE.**—A statute making it unlawful to purchase, sell, expose for



sale, or have in possession any of the birds mentioned therein, but declaring that its provisions shall not be construed to apply to any common carrier into whose possession any of the birds or game shall come in the regular course of their business while in transit to the state from any place without the state where the killing of such birds or game shall be lawful, applies to game killed beyond the state, and makes the sale or the having in possession such game in this state unlawful. *Roth v. State*, 566.

2. **CONSTITUTIONAL LAW—GAME LAWS.**—A statute making it criminal for a person to have in his possession or to purchase or sell certain game birds or animals at the times designated therein is constitutional, though applicable to birds or animals killed outside of the state where such killing was unlawful. *Roth v. State*, 566.

### GARNISHMENT.

See ATTACHMENT.

### GIFTS.

- A **GIFT** is a voluntary transfer of his property by one to another without any consideration or compensation therefor. *Ingram v. Colgan*, 221.

See LEGISLATURE, 4.

### GRANTS.

1. **CONVEYANCE UPON MORTGAGE BLANK.**—The grant of a steam elevator carries with it, as part thereof, the land upon which the elevator is located, and all that is necessarily used in connection therewith free of subsequent execution against the grantor, although the conveyance is written upon a chattel mortgage form, acknowledged as such, and the property is referred to in the instrument as goods and chattels. *Cross v. Weare Commission Co.*, 902.
2. **REVOCABILITY OF.**—GRANTS OF LAND COVERED BY NAVIGABLE STREAMS, though made by state officers under power to grant vacant lands, may be subsequently revoked by the state. *Heyward v. Farmers' Min. Co.*, 702.

### HABEAS CORPUS.

#### FUGITIVES FROM JUSTICE—ARREST AND DETENTION UPON TELEGRAMS.—

The arrest and detention of a person in one state upon the authority of telegrams received from the authorities of another state, reciting that they have a warrant for his arrest, a copy of which is given, together with the statement that they have started after him with proper papers, is unauthorized, and he is entitled to his release upon habeas corpus. *Simmons v. Vandyke*, 411.

### HIGHWAYS.

1. **TELEGRAPH LINES.**—The appropriation of a public highway to the purposes of a telegraph line is a new use. *Daily v. State*, 578.
2. **RIGHTS OF TELEGRAPH LINE IN.**—A statute purporting to grant telegraph corporations the right to use the public highways does not confer any rights as against individuals, nor deprive them of rights which they possessed prior to the enactment of such statute. *Daily v. State*, 578.
3. **ADDITIONAL SERVITUDES.**—ELECTRIC RAILWAYS traversing country highways without legislative consent, and connecting widely separated cities

and towns, impose additional servitudes on the property fronting on the highways so occupied. *Pennsylvania R. R. v. Montgomery County etc. Ry.*, 659.

See CRIMINAL LAW, 5; RAILROADS, 3, 17, 18; TELEGRAPH COMPANIES, 6, 8; TOWNS.

### HOMESTEAD.

A WIDOW CANNOT HAVE ANY RIGHT OF HOMESTEAD in land in which her husband had a life estate only or in which he held the title in trust for another. *Ogden v. Ogden*, 151.

### HOMICIDE.

1. CRIMINAL LAW.—GREAT BODILY INJURY does not necessarily amount to an injury committed on the person. Whether, in any case, the circumstances are such as to justify one in believing that such an injury is about to be committed on him must, to a great extent, be left to the judgment of the jury. *Rogers v. State*, 154.
2. EVIDENCE.—A THREATENING ANONYMOUS LETTER received by the deceased two months before he was killed is not admissible in evidence against his slayer, in the absence of evidence connecting him with the authorship or sending of the letter, or showing that it made any reference to him, or to the subject of the disagreement or other relations between him and the deceased, or that he had any knowledge that the deceased had received such letter. *Karr v. State*, 17.
3. CHARACTER OF AND THREATS BY DECEASED AS JUSTIFICATION.—The character of the deceased for violence and previous threats should be weighed by the jury in determining whether the defendant, when he did the killing, acted under a reasonable apprehension of present impending peril to his life, or of suffering some other grievous bodily harm. *Karr v. State*, 17.
4. THREATS AS JUSTIFICATION.—Evidence that deceased had made threats against the life of the accused and was of a violent and dangerous character does not justify or excuse an immediate resort to deadly weapons resulting in a killing on the mere suspicion that life is endangered. There must be some demonstration, or apparent demonstration, of an intent, coupled with ability to take life, or inflict grievous bodily harm, before extreme measures become defensive and justifiable. *Karr v. State*, 17.
5. CHARACTER OF DECEASED—JUSTIFICATION.—If the deceased was a man of violent and dangerous character, more prompt and decisive measures of defense would be justifiable than if he were of a peaceable disposition. *Karr v. State*, 17.
6. DUTY TO RETREAT.—A PERSON ATTACKED IN HIS OWN DOMICILE is not bound to retreat to avoid killing his adversary. *Karr v. State*, 17.
7. SELF-DEFENSE AGAINST A PERSON WHO HAS LOST HIS REASON AS THE RESULT OF AN ASSAULT UPON HIM.—One who assaults another and so injures him as to deprive him of his reason or his capacity to receive impressions regarding the design and endeavor to cease further combat, and who subsequently kills the person assaulted, cannot be regarded as acting in self-defense, though the latter is about to make an assault upon him with a dangerous weapon after he has declined and ceased further combat, if the person so assaulted has not,

because of such injuries, capacity to know and understand such cessation and declination of further combat. *People v. Button*, 259.

8. SELF-DEFENSE BY ORIGINAL ASSAILANT. — In order for an assailant to justify the killing of his adversary he must not only endeavor to really and in good faith withdraw from the combat, but he must make known his intention to his adversary. If the circumstances are such that he cannot notify him it is the fault of the assailant, and he must take the consequences. *People v. Button*, 259.
9. IF ONE WOUND IS INFLICTED WHILE ACTING IN SELF-DEFENSE, AND ANOTHER AFTER THE DECEASED HAS DECLINED ALL FURTHER COMBAT and was fleeing from the defendant, and each wound was sufficient to have produced death, he may be adjudged guilty of murder in inflicting the last wound if it contributed to the death, though had it not been inflicted, the deceased would have died from the wound given by the defendant while acting in necessary self-defense. If, however, the latter wound did not contribute to the death of the decedent, then he is not guilty of any degree of homicide. *Rogers v. State*, 154.
10. ASSAILANT DECLINING FURTHER COMBAT. — Though a person makes an unlawful assault and inflicts serious injury upon another, yet the subsequent combat between them, though the whole consists of but one combat or assault, may assume such a form as will entitle the first assailant to act in self-defense even to the extent of taking the life of his adversary, as where after the first assault the assailant declines further combat, and such declination is known to and understood by his adversary, who, nevertheless, continues the combat and makes it necessary for the original assailant to defend himself or suffer death or great bodily injury. *People v. Button*, 259.

See APPEAL, 15.

## HUSBAND AND WIFE.

1. A WIFE IS BOUND TO FOLLOW HER HUSBAND when he changes his residence, even without her consent, providing the change is made by him in the bona fide exercise of his power, as head of the family, of determining what is best for it. *Strouse v. Leipf*, 122.
2. MARRIED WOMEN—STATUTES, CONSTRUCTION OF.—If a statute concerning married women is, in the main, remedial it should be construed and administered so as to give effect to its general object and purpose. *Glow v. Chapman*, 468.
3. A STATUTE SECURING TO MARRIED WOMEN THEIR SEPARATE ESTATES does not deprive the husband of his power and authority as head of the family, nor render him any the less accountable for the economy and administration of the household. Therefore, if the family occupies premises which are the separate estate of the wife, and a vicious dog is kept thereon belonging to her, the husband, and not she, is answerable for the injuries resulting from the escape of such dog, and his attacking a third person on a highway adjacent to the premises. *Strouse v. Leipf*, 122.
4. DEALINGS BETWEEN, AS TO HER SEPARATE ESTATE.—A wife may deal with her husband with respect to her separate estate as though the relationship of marriage did not exist, subject to the conditions prescribed by statute. *Williams v. Harris*, 753.

5. **CONVEYANCE FROM A HUSBAND TO HIS WIFE IS NOT VOID.**—Its effect is to give her an equitable estate while he holds the legal title as her trustee. *Ogden v. Ogden*, 151.
  6. **CONVEYANCE BY HUSBAND AND WIFE.**—THOUGH THE NAME OF A WIFE IS PLACED AFTER that of her husband in a conveyance it will not be presumed that she joined therein merely for the purpose of waiving her dower, when by the terms of the instrument she appears as one of the parties conveying and quitclaiming all her interest in the land described therein. *Lake Erie etc. R. R. Co. v. Whitkan*, 355.
  7. **JOINDER OF.**—In an action to recover damages resulting from the negligence or other tort of a wife it was, at the common law, necessary to join her husband. *Strouse v. Leipf*, 122.
  8. **JOINDER OF IN ACTIONS FOR HER TORTS.**—Under a statute exonerating a husband from liability for the torts of his wife in which he does not participate, and declaring that she shall be suable therefor as if she were sole, it is not proper to join her husband with her in an action for tort committed by her alone. *Strouse v. Leipf*, 122.
  9. **A WRONG COMMITTED BY A WIFE** in the presence of her husband is presumed to be his act. *Strouse v. Leipf*, 122.
  10. **LIABILITY OF THE LATTER FOR TORTS.**—If a statute declares that a husband is not liable for the torts of his wife in which he does not participate, and that she is answerable therefor, it does not enlarge her liability, but merely transfers the burden from the joint shoulders of both and places it on the wife alone. *Strouse v. Leipf*, 122.
  11. **LIABILITY OF THE LATTER FOR THE ACT OF VICIOUS ANIMALS.**—If a vicious dog is kept on premises occupied by a husband and wife, though both the premises and the animal are owned by her, still the keeping of the dog is a matter over which he is authorized to exercise control as the head of the family, and, if it escapes and injures a third person, the husband alone is answerable, notwithstanding a statute declaring that he shall not be liable for any torts of his wife in which he does not participate, and that she shall be suable therefor. *Strouse v. Leipf*, 122.
  12. **ALIENATION OF HUSBAND'S AFFECTIONS.**—Under statutes giving the wife a separate legal existence, and placing her, with respect to her property and personal rights, upon an equality with her husband, she may maintain an action against a third person for alienating her husband's affections and depriving her of his society. *Glow v. Chapman*, 468.
- See ADVERSE POSSESSION, 4; APPEAL, 5; CURTESY; FRAUDULENT CONVEYANCES, 5, 6; LARCENY, 1, 2.

#### IMPEACHMENT.

See WITNESSES, 12.

#### IMPRISONMENT.

See CRIMINAL LAW, 6.

#### INFANTS.

See INTOXICATING LIQUORS; NEGLIGENCE, 4-6; PARENT AND CHILD; REAL PROPERTY, 5, 6.

## INJUNCTIONS.

1. **PLEADING.**—In a complaint for an injunction against a boycott the plaintiff must definitely state the facts and circumstances constituting the proximate cause of his injuries, or the apprehension of those threatened and imminent. *Longshore Printing Co. v. Howell*, 640.
2. **BOYCOTT.**—In a complaint for an injunction to restrain a boycott on one's business, allegations that the officers and members of a certain trades union conspire to compel the plaintiff to submit to the dictation of the union upon pain of being boycotted in business; that the executive committee of the union entered his place of business without leave or license, and ordered the union men at work therein to cease work under penalty of being dealt with according to the laws and regulations of the union; that the defendants induced the city council, by threats of boycott at the polls, to reject the plaintiff's bid for the city printing, although it was the lowest made; that defendants threatened to boycott the plaintiff's customers if they patronized him, whereby he lost one customer and would lose another; and that defendants circulated a knowledge of such acts by the posting of notices, all of which acts were committed within a space of about ten months, to the past and future injury of plaintiff's business, do not justify an injunction, as such acts do not show that the plaintiff is without remedy in a court of law, or that the injury will be irreparable unless enjoined. *Longshore Printing Co. v. Howell*, 640.
3. **BOYCOTT.**—Although a conspiracy may not be indictable under the statute a combination to injure the public or individuals is *per se* wrongful, and the fact that it is not made a statutory offense does not change the civil consequences. Hence, if two or more persons conspire and combine to injure or destroy another's business, and it is clearly made to appear that the injury is threatened and imminent, and will become irreparable to the suitor, an injunction will lie to restrain the conspirators, though no statute may be violated by their acts. *Longshore Printing Co. v. Howell*, 640.
4. **BOYCOTT.**—An injunction will issue to protect property rights against irreparable damage by wrongdoers, and it is a proper and available remedy to stay the destructive and pernicious ravages of a boycott, but the power to grant it in such cases should be cautiously exercised. It will be refused until it appears that some right is about to be destroyed, irreparably injured, or that great and lasting injury is about to be done by an illegal act. *Longshore Printing Co. v. Howell*, 640.
5. **NUISANCE—INJUNCTION AGAINST.**—An individual has the right to enjoin the erection or continuance of a nuisance which causes him to suffer a special injury or annoyance, different in kind and degree from that sustained by the public generally. *Kaufman v. Stein*, 368.
6. **NUISANCE—REMOVAL OF WOODEN BUILDING WITHIN FIRE LIMITS.**—A property owner has a right to enjoin the removal of a wooden building to a place within the fire limits in violation of a city ordinance forbidding it, if it is to be located within a short distance of his own frame house, thus making the danger imminent. *Kaufman v. Stein*, 368.
7. **EMINENT DOMAIN—COMPENSATION AS CONDITION PRECEDENT.**—If the statute provides that compensation shall be made as a condition precedent to the taking of private property for public use, an in-

junction will issue to prevent the use of the property, or to abate its use if already appropriated, until the condition has been complied with. *Willamette Iron Works v. Oregon Ry. etc. Co.*, 620.

1. **MANDATORY INJUNCTIONS—REMOVAL OF WALL.**—If a party intending to build a wall entirely upon his own land, through a mistaken survey builds it so that its foundation encroaches slightly upon the land of an adjoining owner, without any encroachment above the surface, the wall is not a party-wall, and, upon the refusal of such adjoining owner to allow an entry upon his land by the builder for the purpose of removing the projecting foundation, the latter may be compelled by mandatory injunction to remove it from that side of the wall upon his own land. *Pile v. Pedrick*, 677.
2. **EMINENT DOMAIN—MANDATORY INJUNCTION.**—If an easement in a street is taken for public use with the knowledge of, and without objection by, the abutting property owner, but under the assurance that such taking is only intended to be temporary, and the structure constituting the taking afterward becomes permanent and exclusive in character, an injunction to restrain the further use of plaintiff's easement in the street should not be made mandatory until a reasonable time has been allowed in which to acquire his easement by agreement or by condemnation proceedings. *Willamette Iron Works v. Oregon Ry. etc. Co.*, 620.

See APPEAL, 3; ATTACHMENT, 2; INTERVENTION, 2.

#### INSANITY.

See WITNESSES, 14, 15.

#### INSOLVENCY.

See CORPORATIONS, 12; FRAUDULENT CONVEYANCES, 1.

#### INSTRUCTIONS.

See APPEAL, 13, 14; CRIMINAL LAW, 2; RAILROADS, 19-21; TRIAL, 6-9.

#### INSURANCE.

1. **PLEADING SHOWING INTEREST OF THE INSURED.**—If, in an action upon a policy of insurance against loss by fire, it is alleged that one of the plaintiffs has an interest in the property as widow of the deceased, and that the other had a claim against his estate, to pay which there is no property except that insured, the insurable interest of such plaintiffs sufficiently appears. *Creed v. Sun Fire Office*, 134.
2. **INSURABLE INTEREST.**—A creditor has an insurable interest in a building on property of the estate of his deceased debtor, and which may be subjected to the payment of his debt, the personal property of the estate being insufficient for that purpose. *Creed v. Sun Fire Office*, 134.
3. **AGENT'S FRAUD IN WRITING ANSWERS INCORRECTLY.**—If application for insurance is made to an agent authorized to issue policies of fire insurance to whom the applicant fully and truly stated his interest in the property, and the agent, being fully informed, drew up the application, received the premium, and turned over the policy to the applicant, it cannot be avoided on the ground that he was not the unconditional and sole owner of the property, and that his interest therein was not correctly stated in his application, though the policy contains

a condition that it shall be void if the interest of the assured is other than the unconditional and sole ownership of the property insured. *Creed v. Sun Fire Office*, 134.

4. **AGENCY—EVIDENCE.**—It is competent and admissible, upon the question as to whether a certain person was an agent of an insurance company, for the assured to show that, on his examination under oath as to the facts of the fire, such person appeared, claiming to represent the company, and apparently did so, and that he subsequently, in response to inquiries about the written statement taken on such examination, wrote the assured a letter, at the head of which he was advertised as "adjuster" of the company. *Enos v. St. Paul etc. Ins. Co.*, 796.
5. **PROOFS OF LOSS—WAIVER.**—An objection to the sufficiency of proofs of loss on a specific ground is a waiver of all other grounds. *Enos v. St. Paul etc. Ins. Co.*, 796.
6. **STATEMENT ON EXAMINATION UNDER OATH AS PROOF OF LOSS—ESTOPPEL.**—If an insurance company subjects the assured to an examination under oath as to the facts of the fire, and a person appears, claiming to represent the company, and apparently does so, and evidence upon the question of his agency is subsequently before a jury, it is competent, as the first element of an estoppel against the company, to show that it was mutually understood that the statement made in such examination should be accepted as proof of loss. But, to make a complete estoppel, such evidence would have to be supplemented by other evidence. *Enos v. St. Paul etc. Ins. Co.*, 796.
7. **EXAMINATION UNDER OATH AS PROOF OF LOSS—ESTOPPEL.**—If an insurance company, having subjected the assured to an examination under oath as to the facts of the fire, is informed that a person appeared at such examination, assuming to act as agent of the company, and represented that the statement made on such examination should be accepted as proof of loss, and the insured relied upon such understanding, and was not notified by the company to the contrary, but is encouraged by it to continue in such belief, the company is estopped from afterward refusing to treat such statement as proof of loss. *Enos v. St. Paul etc. Ins. Co.*, 796.
8. **CONTRACT, ILLEGAL AGREEMENT AS A DEFENSE.**—If a claim against an insurer is compromised upon the consideration that he will not prosecute the assured upon a charge of burning the property such compromise is illegal, will not be enforced at the instance of the assured, and constitutes no impediment to an action upon the original policy. *Insurance Co. v. Hull*, 571.
9. **CONTRACT, ILLEGAL, NO RESCISSION NECESSARY.**—If an assured compromises his claim and accepts a less sum than that due, in consideration of the promise of the insurer not to prosecute the former on a charge of burning the property insured, the consideration is illegal and the compromise void, and the assured, without any rescission, may maintain an action upon his policy as though such compromise had not been effected. *Insurance Co. v. Hull*, 571.
10. **RESCISSION—CONSIDERATION, RETURN OF WHEN NOT NECESSARY.**—If a person entitled to recover the value of property insured and afterward destroyed by fire makes an agreement of compromise under which he receives a less sum than is due, and such compromise is as against him fraudulent or otherwise illegal and nonenforceable, he may maintain an action against the insurer upon the original liability without first

returning the money received under the compromise, because he is entitled to the sum so received, whether the compromise is valid or invalid. *Insurance Co. v. Hull*, 571.

11. **FORFEITURE OF.—THE PLACING OF A STOVEPIPE THROUGH THE ROOF** of an insured dwelling avoids the policy, if it declares that no dwelling-house shall be taken as a risk unless provided with good and sufficient brick or stone chimneys, and that the insurer excludes as risks any and all buildings which have in use stovepipes passing through the roofs thereof. *McKinney v. German etc. Ins. Soc.*, 861.
12. **FORFEITURE—ESTOPPEL.**—If an insurance company, by virtue of a provision in its policy, subjects the assured to an examination under oath as to the facts of the fire, it cannot afterward claim a forfeiture of his rights, under the policy, on the ground that no notice of loss was given or proof of the same furnished. *Enos v. St. Paul etc. Ins. Co.*, 796.
13. **FORFEITURES** are not favored, and must, therefore, rest on substantial grounds. Hence, if one ground of defense against the payment of a loss is that the insured fraudulently set the fire which caused it, the refusal of the insured to answer certain questions about a large amount of money of which he claimed to have been robbed at the time of the fire, and which property was not covered by the insurance, does not warrant a forfeiture of the rights of the insured under the policy for failure to make proper proof of loss, especially where his claim is found not to have been fraudulently and materially untrue. *Enos v. St. Paul etc. Ins. Co.*, 796.
14. **WAIVER OF FORFEITURE.**—If a stovepipe is used on insured premises in a manner forbidden and made a cause of forfeiture by a policy, but assessments are made and paid on a premium note after knowledge by the agents of the assured of the cause of forfeiture, it is thereby waived. *McKinney v. German etc. Ins. Soc.*, 861.
15. **PAROL WAIVER OF RIGHT TO REBUILD** an insured structure destroyed by fire may be shown, notwithstanding a written submission of the question of actual loss to arbitration. *Platt v. Aetna Ins. Co.*, 877.
16. **WAIVER OF RIGHT TO REBUILD.**—An unconditional refusal by an insurer to rebuild a fire loss made before arbitration, with a promise to pay an award when made, is a waiver of the right to rebuild, and is final and conclusive upon the insurer, without a new consideration, although the insurer subsequently, within the thirty days allowed for an election, gives the insured notice that he will rebuild. *Platt v. Aetna Ins. Co.*, 877.
17. **ARBITRATION AS WAIVER OF RIGHT TO REBUILD.**—A written submission of an insured fire loss to arbitration, providing that such arbitration shall not affect the rights of either party, except as to the actual amount of the loss, does not waive the insurer's reserved right to rebuild. *Platt v. Aetna Ins. Co.*, 877.
18. **WAIVER.**—If an insurance company, having knowledge of facts rendering its policy voidable, deliberately claims and exercises a right thereunder, it waives all right to avoid it because of such facts. *Enos v. St. Paul etc. Ins. Co.*, 796.
19. **CORPORATIONS, FOREIGN, JURISDICTION OVER.**—A corporation receiving an application to insure property situate in another state and issuing a policy thereon must be deemed to subject itself to the jurisdiction of the courts of that state and to the right of the insured to bring an



action upon the policy in the state wherein his property is situate, and to serve process on the insurer in the manner prescribed by the laws of that state. Therefore, if a statute of that state defines who shall be regarded as agents of an insurer and that process may be served upon any of such agents, a judgment based upon the service of such process on such an agent, valid in the state where rendered, is equally valid in a state wherein the insuring corporation has its principal place of business and of which it is a resident. *Firemen's Ins. Co. v. Thompson*, 335.

20. INSURANCE CORPORATIONS MAY, IN THE STATES WHEREIN THEY ARE CREATED, INSURE PROPERTY SITUATE IN ANOTHER STATE by whose laws they are forbidden to do business therein; whereas if the contract of insurance were entered into in the latter state it would be void. *Seamans v. Knapp-Stout etc. Co.*, 825.
21. CONTRACT, WHERE DEEMED TO HAVE BEEN MADE.—If insurance is solicited in another state by a broker, and the property owner there consents to take insurance in companies acceptable to such broker, who thereupon requests an insurance corporation of this state to write such insurance, and it, at its office in this state, fills out an application for the insurance, and prepares a premium note to be signed by the property owner, and transmits the note and application to him, and at the same time fills out a policy of insurance, all these papers being dated at its home office, and stipulating that the contract of insurance shall be governed by the laws of this state, and the papers are then sent to the brokers, and by them mailed to the property owner, who, on his part, then answers the questions contained in the contract, signs the premium note, accepts the policy, transmits the application and note and a cash premium to the brokers, who in turn send them to the insurer in this state, the contract of insurance is not completed until the note and application are accepted by the insurer, and hence must be deemed to have been made in this state. *Seamans v. Knapp-Stout etc. Co.*, 825.
22. INSURANCE BY FOREIGN CORPORATION, WHEN FORBIDDEN.—If a statute declares that no foreign insurance company shall directly or indirectly take any risks or transact any business of insurance in this state until it has complied with the requirements of such statute, a contract insuring property in this state made by such a corporation in the state of its creation will not support an action in this state to recover an assessment made against the insured. *Ross v. Kimberly*, 855.
23. INSURANCE AGAINST ACCIDENT.—WHETHER THERE HAS BEEN AN ENTIRE LOSS OF A HAND within the meaning of a policy of insurance when three fingers have been wholly and another partly torn off, the hand cut, and the thumb joint destroyed, is a question for the jury. If the hand was so injured as to become useless as a hand, the insurer is answerable for its loss. *Lord v. American etc. Accident Assn.*, 815.

See JUDGMENTS, 12.

## INTEREST.

See USURY.

## INTERSTATE COMMERCE

1. THE TERM, "TO PACK," means to place together and prepare for transportation, as to make up a bundle or bale. *State v. Parsons*, 457.

2. A "PACKAGE" is a bundle or bale made up for transportation. It may consist of a single article, but, when separate articles are placed together, and prepared for transportation in a bundle, bale, or box, they do not form as many separate packages as there are articles, though they may be wrapped separately. *State v. Parsons*, 457.
3. "ORIGINAL PACKAGE"—The case, or box, or bale in which separate articles are placed together for transportation constitutes the "original package" in the commercial sense. No single article therein, though separately wrapped, is an original package. *State v. Parsons*, 457.
4. PEDDLING MEDICINE.—The commerce clause of the federal constitution will not, as against a state statute defining a peddler and imposing a fine for dealing as such without a license, protect one who peddles single bottles of medicine manufactured in another state, and which are taken from a box in which several bottles are separately wrapped and shipped into the state where the sale and delivery is made. *State v. Parsons*, 457.

See TELEGRAPH COMPANIES, 7.

#### INTERVENTION.

1. AVERMENTS OF PETITION so far as they are well pleaded must be taken to be true in determining whether an application to intervene should be allowed. *Wood v. Denver City Water Works Co.*, 288.
2. INTEREST IN SUIT.—If a water company, claiming the exclusive right to furnish a certain town and its inhabitants with water for domestic and other uses, brings an action for an injunction against another water company to restrain it from furnishing such water, residents of such town who have taken steps to procure water from the defendant company and who have expended large sums of money, in digging trenches and laying pipes connecting their residences with the water-mains of such company, and who allege that they cannot obtain a supply of pure water from the plaintiff company, are entitled to intervene therein. *Wood v. Denver City Water Works Co.*, 288.
3. INTEREST WHICH ENTITLES PERSONS to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation of the judgment. *Wood v. Denver City Water Works Co.*, 288.

#### INTOXICATING LIQUORS.

**LIQUOR, SALES OF TO MINORS WHO ARE ACTING AS AGENTS.**—If liquor is sold to a minor who at the time declares that he is purchasing it for another whose name is not disclosed the sale must be regarded as made to the minor, and not to the undisclosed principal, and the seller is liable to punishment under a statute making it criminal to sell liquor to a minor. *Neeley v. State*, 148.

See MUNICIPAL CORPORATIONS, 14, 15.

#### INTOXICATION.

See EVIDENCE; FRAUD, 1, 2.

## JOINT LIABILITY.

**PRACTICE—CODEFENDANTS' RIGHT TO RELIEF AS AGAINST ONE ANOTHER.—**

Defendants who merely answer the complaint of the plaintiff, though in doing so they aver that creditors of another class have been guilty of bad faith and collusion are not entitled to affirmative relief against other codefendants. To obtain that they should interpose a cross-complaint. *Ballin v. Merchants' Exchange Bank*, 834.

## JOINT TENANCY.

See PARTNERSHIP, 14.

## JUDGES.

See WITNESSES, 1.

## JUDGMENTS.

1. **JURISDICTION.**—THERE IS AN IMPORTANT DIFFERENCE BETWEEN A WANT OF JURISDICTION AND A MERE DEFECT in obtaining it. In the former case the judgment is absolutely void. In the latter case it is simply erroneous and voidable, and can be attacked only by some direct proceeding authorized by law. *North Pacific Cycle Co. v. Thomas*, 636.
2. **ENTRY OF, WHAT IS NOT.**—If a record shows that a jury has been sworn and impaneled, and that they find for the plaintiff for the lot sued for (describing it), and twenty-five dollars for detention, and adds "and judgment is rendered against the defendants for the land sued for, together with all costs in this behalf expended, for which execution may issue," this is not such an entry of judgment as will support an appeal. *Bell v. Otis*, 117.
3. **DEFICIENT PLEADINGS—COLLATERAL ATTACK.**—If the object of the plaintiff can be ascertained from his complaint, and the court has power to grant the relief demanded and jurisdiction of the parties, the judgment rendered is not subject to collateral attack, although the complaint may, in fact, have been bad in substance. *North Pacific Cycle Co. v. Thomas*, 636.
4. **RES JUDICATA.**—THE FINAL SETTLEMENT OF AN ESTATE IN THE PROBATE COURT has the effect of a judgment as to all matters properly included therein or necessarily involved. Hence, if a deceased husband and wife each leaves an estate, both of which are administered upon by the same person, and the settlement of the wife's estate becomes a finality, no appeal having been taken, it is a bar to any showing, in the settlement of the other estate, that the fund adjudged to the heirs of the wife's estate did not belong to that estate, but to the other. *Young v. Byrd*, 461.
5. **RES JUDICATA.**—The final determination of an issue of fact by a competent court, and upon the merits, is *res judicata* as to the parties then before the court, though it is afterward sought to relitigate the same issue in another form. Nor is it essential that all the parties to both proceedings be identical. *Young v. Byrd*, 461.
6. **UNAUTHORIZED APPEARANCE OF ATTORNEY—RELIEF.**—The relief to which a defendant is entitled when a judgment against him has been procured through the unauthorized appearance of an attorney is to have such judgment opened and proceedings therein stayed until a trial can be had on the merits. *Hollinger v. Reeme*, 402.

7. A JUDGMENT OBTAINED BY FRAUD IS BINDING on the parties until set aside in some direct proceeding. *Hollinger v. Reeme*, 402.
  8. IMPEACHMENT FOR FRAUD.—A judgment cannot be impeached in a collateral proceeding for fraud or collusion. *Hollinger v. Reeme*, 402.
  9. SETTING ASIDE FOR FRAUD.—One who seeks to have a judgment set aside for fraud must show in his application that he has a meritorious defense, which he was without his laches prevented from making; and that he has made his application for relief without delay after the discovery. *Hollinger v. Reeme*, 402.
  10. QUESTION OF LAW—CONSTRUCTION OF RECORD.—The legal force of a judgment and record offered in evidence is a question of law which the court should solve by an instruction when requested. *Young v. Byrd*, 461.
  11. JUDGMENTS OF SISTER STATES—EFFECT OF IN OTHER STATES.—The provisions of the federal constitution requiring full faith and credit to be given in each state to the judicial proceedings of sister states are confined to such judicial determinations as possess the quality of judgments, and do not extend to proceedings in the nature of execution, or to orders merely ancillary to some special form of relief. *Bullock v. Bullock*, 528.
  12. JUDGMENT OF SISTER STATE, EFFECT OF.—A judgment entered against an insurance corporation is entitled to have the credit, effect, and value in this state which it has in the state where rendered. Whatever pleas are good to a suit on the judgment in that state can be pleaded in the courts of this state and no others. *Firemen's Ins. Co. v. Thompson*, 335.
  13. EXTRATERRITORIAL EFFECT IN REM.—The courts of one state have no jurisdiction to affect by decree or judgment the status of lands lying within another state. *Bullock v. Bullock*, 528.
  14. EXTRATERRITORIAL EFFECT.—An order of a court of another state, made subsequent to decree of divorce rendered therein, directing and requiring the defendant to execute a mortgage on land in another state to secure the payment of alimony, is not conclusive upon the courts of the latter state, and cannot be enforced therein, but may be enforced by the court rendering it, so long as defendant is within its jurisdiction, and, when so enforced, is effective in the *situs rei*. *Bullock v. Bullock*, 528.
  15. EXTRATERRITORIAL EFFECT IN REM.—The courts of the *situs* of land are not bound by the judgment of a court of another state affecting such land in an action in which the jurisdiction is *in personam* only. *Bullock v. Bullock*, 528.
  16. JUDGMENTS BY CONFESSION—COSTS.—Upon confession of judgment for a fine and costs by a defendant and his sureties under the provisions of a statute that "when a fine is assessed the court may allow the defendant to confess judgment, with good and sufficient sureties for the fine and costs," the court may properly refuse to enter an order limiting the confession as to the costs to such as have been incurred on behalf of the state. *Yeldell v. State*, 20.
- See CORPORATIONS, 10; CRIMINAL LAW, 6; EQUITY, 1; FRAUDULENT CONVEYANCES, 7.

## JUDICIAL NOTICE.

See EVIDENCE, 1; PLEADING, 2.

## JURISDICTION.

See EQUITY, 1, 2; INSURANCE, 19; JUDGMENTS, 1, 13-15; JUSTICES OF THE PEACE.

## JUSTICES OF THE PEACE.

**JURISDICTION.**—If a cause of action for a sum of money is so great as to be beyond the jurisdiction of a justice of the peace, the holder, before commencing suit, may, for the purpose of conferring jurisdiction, remit so much of such cause as will bring the residue within such jurisdiction, and, if he does so, the judgment of the justice for such residue is valid. *Huntton v. Luce*, 165.

## JUSTIFICATION.

See HOMICIDE; LIBEL, 12;

## KNOWLEDGE.

See AGENCY, 4-7.

## LABOR UNIONS.

1. **TRADES UNIONS AND LABOR ORGANIZATIONS MUST DEPEND** for their membership upon the free choice of each member, and his perfect freedom of action. No resort can be had to violence, threats, intimidation, or other compulsory methods, in matters concerning membership, or to enforce the observance of their laws, rules, and regulations. *Longshore Printing Co. v. Howell*, 640.
2. **CONSPIRACY.**—TRADES UNIONS ARE NOT UNLAWFUL COMBINATIONS, so long as they do not resort to acts tending to destroy freedom of action, such as intimidation, threats, or violence. Hence, it is not contrary to public policy or illegal for a member of a union to combine with others for the purpose of maintaining wages or limiting the number of apprentices. *Longshore Printing Co. v. Howell*, 640.
3. **ORDERING EMPLOYEES TO STOP WORK.**—Under a statute making it a misdemeanor for any one by force, threats, or intimidation to prevent, or endeavor to prevent, any employee from continuing his work, the act of the executive committee of a labor union in entering the premises of a person and ordering all members of the union then and there at work to cease further work under penalty of being dealt with according to the laws and regulations of the union is not unlawful in the absence of intimidation, threats, or violence. *Longshore Printing Co. v. Howell*, 640.

## LARCENY.

1. **LARCENY BY HUSBAND FROM WIFE.**—Under the enabling statutes of Indiana a husband's interest in his wife's goods and chattels is abolished, as is also the right to fraudulently misappropriate them. Hence, he may be guilty of larceny of the goods of his wife. *Beasley v. State*, 418.
2. **LARCENY BY HUSBAND FROM WIFE.**—A husband who obtains his wife's money by trick or artifice and carries it away is guilty of larceny if the circumstances attending the wrongful act are such that, if performed by another, it would constitute a felonious asportation. *Beasley v. State*, 418.
3. **LARCENY BY TRICK OR ARTIFICE.**—One who obtains the money or goods of another by some fraudulent trick or artifice and carries them away is guilty of larceny. *Beasley v. State*, 418.

## LAW OF THE CASE.

See APPEAL, 6, 7.

## LEGISLATURE.

1. **POWERS OF.**—The legislature of a state is clothed with the whole legislative power capable of being exercised therein, subject only to such restrictions and regulation as are embraced in the state and national constitutions. *Mauldin v. City Council*, 723.
  2. **CONSTITUTIONAL LAW—PERSONAL PRIVILEGES.**—The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. *Ritchie v. People*, 315.
  3. **CONSTITUTIONAL LAW—RIGHT TO CONTRACT.**—The legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom to contract between workmen and employers. *Ritchie v. People*, 315.
  4. **CONSTITUTIONAL LAW—GIFTS OF PUBLIC MONIES, WHAT ARE NOT.**—A statute authorizing a bounty to be paid for the destruction of coyotes does not amount to a gift, and therefore does not conflict with the constitutional provision declaring that the legislature shall have no power to make any gift, or to authorize the making of a gift, of any public money or thing of value to any individual, or municipal or other corporation, whatever. *Ingram v. Colgan*, 221.
- See CONSTITUTIONS, 2, 3; MUNICIPAL CORPORATIONS, 1, 2; STATUTES, 4; TAXES, 1-3.

## LETTERS.

See CONTRACTS, 2, 3.

## LEVIES.

See EMINENT DOMAIN; WATERS, 14, 16.

## LIBEL.

1. **A CORPORATION MAY SUE FOR A LIBEL OR SLANDER** against it in the way of its business or trade. *St. James etc. Academy v. Gaiser*, 502.
2. **CONSTRUCTION OF LANGUAGE.**—In construing a publication alleged to be libelous the whole article is to be read and considered together, and such construction put upon the language used as would naturally be given to it. *St. James etc. Academy v. Gaiser*, 502.
3. **REFERENCE TO PROPERTY.**—If the words of a libelous publication apply to the property of the prosecuting witness in such a manner as to injure his reputation by exposing him to hatred, contempt, or ridicule it is a libel upon him. *State v. Mason*, 629.
4. **EVIDENCE AS TO PERSON REFERRED TO.**—If the words of a libelous article are ambiguous as to the person intended, persons who read the libel and are acquainted with the parties and the circumstances may state their judgment and understanding as to whom it refers. This rule of evidence is the same in both civil and criminal cases. *State v. Mason*, 629.
5. **MALICE IS IMPLIED FROM A LIBELOUS PUBLICATION.** *St. James etc. Academy v. Gaiser*, 502.
6. **PRESUMPTION OF MALICE.**—Every libelous publication concerning another is presumed to have been made maliciously, whether the offender

- intended ill-will toward the person injured or not. This presumption continues until it appears that the libel is in fact true, and was published with good motives and justifiable ends. *State v. Mason*, 629.
7. **MALICE.—TO RENDER AN ACT MALICIOUS** it is not necessary that the party doing it shall be actuated by a feeling of hatred or ill-will, or by a distinct purpose to injure. *State v. Mason*, 629.
  8. **INTENT TO INJURE—MALICE.**—Under a statute providing that, if any person shall publish or cause to be published concerning another any false or scandalous matter, "with intent to injure or defame," he shall be punished, etc., it is not necessary, to constitute the offense of libel, that the publisher should have entertained a specific malicious intent "to injure and defame" the prosecuting witness, as the natural and probable consequence of the publication is to injure and defame, and the law will infer that the publisher intended the results of his act. *State v. Mason*, 629.
  9. **INJURY TO TRADE OR BUSINESS.**—Words falsely published of a party in connection with his business, trade, or profession are actionable *per se* without proof of special damages. *St. James etc. Academy v. Gaiser*, 502.
  10. **INJURY TO BUSINESS—TEACHING DANCING.**—If an institution of learning and education is in a flourishing condition, and is in good repute, and well esteemed by its patrons and good citizens, though it permits occasional dancing in its school building, a false publication charging it with conducting and maintaining an "immoral school," a "dancing school," harmful "to the moral and religious interests of the community," and calling upon friends of religion and good morals to absent themselves from it, is actionable *per se*. *St. James etc. Academy v. Gaiser*, 502.
  11. **KNOWLEDGE OF MANAGER OR PROPRIETOR OF NEWSPAPER—DEFENSE.** The manager or proprietor of a newspaper is *prima facie* criminally liable for a libel published therein, and cannot escape responsibility simply by showing that it was published without his knowledge or consent. He must further show that the publication did not occur through any negligence or want of ordinary care on his part. *State v. Mason*, 629.
  12. **JUSTIFICATION IS A QUESTION FOR THE JURY.**—Whether a publication charging an institution of learning and education with conducting and maintaining a "dancing school" is justifiable on the ground that dancing is immoral is a question for the jury under a constitutional provision making them judges of the law as well as of the facts in libel suits. *St. James etc. Academy v. Gaiser*, 502.
  13. **JURY AS JUDGES OF LAW AND FACT—PLEADINGS.**—A constitutional provision making the jury judges of the law as well as of the facts in a libel suit does not relieve the court of the duty of passing upon the pleadings in the case. *St. James etc. Academy v. Gaiser*, 502.

## LICENSE.

See EASEMENTS; PEDDLERS, 2.

## LIENS.

1. **SALES—LIEN FOR PURCHASE PRICE.**—If a lien is given in writing upon several articles of personalty sold until the whole amount of the purchase price thereof is paid the payment of the price of one of the arti-

cles does not discharge it from the lien for the aggregate price of all of such articles. *Wood v. Holly Mfg. Co.*, 56.

2. **MORTGAGE EQUITABLE—LIEN FOR PURCHASE PRICE.**—It constitutes no objection to the enforcement of a lien for the purchase price in favor of the vendor of machinery constituting an equitable lien thereon that such machinery forms a part of waterworks intended for a public supply, and that great public inconvenience will be occasioned by the removal of the machinery. *Wood v. Holly Mfg. Co.*, 56.
  2. **FIXTURES—LIEN FOR PURCHASE PRICE OF MACHINERY AS AGAINST PURCHASER OF LAND.**—Parties claiming machinery attached as fixtures to land, as against a lien in favor of the vendor thereof, on the ground that they are bona fide purchasers of the land, must show that they are such purchasers without notice in respect to the land which is claimed by them under a mortgage, as well as to the bonds which such mortgage was made to secure. *Wood v. Holly Mfg. Co.*, 56.
  4. **SALES—EQUITABLE LIEN FOR PURCHASE PRICE OF MACHINERY.**—The lien of a vendor of machinery reserved by the contract of sale upon all of the machinery placed upon certain land cannot be affected by the fact that a portion of the machinery was placed upon the land after it was conveyed to a third party who acquired only such rights as the original owner had. *Wood v. Holly Mfg. Co.*, 56.
- See ACTIONS, 2; ASSIGNMENT; CREDITOR'S SUIT; FRAUDULENT CONVEYANCES, 7; MECHANICS' LIENS, 3; MORTGAGES, 3-5; PARTNERSHIP, 19; SHIPPING.

#### LIMITATIONS OF ACTIONS.

1. **CONFLICT OF LAWS.**—THE STATUTE OF LIMITATIONS IN FORCE WHEN A CAUSE OF ACTION ACCRUES controls rather than an amendment subsequently adopted. The amendment does not operate retroactively. *Heyward v. Farmers' Min. Co.*, 702.
2. **THE COMPLETE BAR OF THE STATUTE OF LIMITATIONS IS A VESTED RIGHT,** and therefore the legislature cannot authorize the assertion of a claim if such bar has become final. *Board of Education v. Blodgett*, 348.
2. **MUNICIPAL CORPORATIONS.**—AFTER A STATUTE OF LIMITATION HAS COMPLETELY BARRED the right to assert an obligation against a municipal corporation the legislature cannot revive it. *Board of Education v. Blodgett*, 348.
4. **THE ESTATE OF A REVERSIONER** cannot be affected by the statute of limitations during the lifetime of the tenant for life who is in possession of the property. The possession of the latter cannot be adverse to the former. *Ogden v. Ogden*, 151.

See ADVERSE POSSESSION, 4; CONTRACTS, 6; TRUSTS, 5.

#### LOAN ASSOCIATIONS.

See ASSOCIATIONS.

#### LOANS.

See AGENT, 4-7.

#### MACHINERY.

See CONTRACTS, 5; FIXTURES, 4, 5; LIENS, 2-4; MORTGAGES, 2.



## MALICE.

See LIBEL, 5-8.

## MANDAMUS.

1. MANDAMUS MAY ISSUE TO COMPEL THE MAYOR OF A CITY TO ADMINISTER AN OATH OF OFFICE where the law requires him so to do. *Fox v. McDonald*, 98.
2. MANDAMUS WILL NOT LIE TO COMPEL THE ISSUING OF STOCK IN A PRIVATE CORPORATION if the statute of the state in which the writ was applied for forbids its issuing where there is a plain and adequate remedy in the ordinary course of law. The remedy of the party entitled to such issuing is either at law to recover damages or in equity to compel the officers of the corporation to execute and deliver a proper certificate of stock. *State v. Carpenter*, 556.

See PLEADING, 8.

## MARRIAGE AND DIVORCE.

1. ALIMONY.—If the answer in an action for divorce by an alleged wife denies the marriage, temporary alimony and expense money will not be allowed until the plaintiff makes out a reasonably plain case as to the existence of the marriage. Its averment and denial in the pleadings do not bind the court, and if a fair presumption of the fact is raised by proofs presented, the court has power to make the allowance. It is not necessary that it be established so conclusively as would be required for the ultimate purpose of the action. *Bardin v. Bardin*, 791.
2. APPEAL—AMOUNT OF ALIMONY.—In an action for divorce the amount of temporary alimony and expense money *pendente lite* is in the discretion of the court, and will not be reviewed unless that discretion has been abused. *Bardin v. Bardin*, 791.

## MARRIED WOMEN.

See CONFLICT OF LAWS; HUSBAND AND WIFE.

## MARSHALING SECURITIES.

See DEBTOR AND CREDITOR, 2, 3; PARTNERSHIP, 2.

## MASTER AND SERVANT.

1. NEGLIGENCE—PROXIMATE CAUSE.—It is negligence for which the master is responsible for his servant while intrusted by him with his team of high-spirited horses to leave them unhitched and uncared for by the side of a public highway. *Pierce v. Conners*, 279.
2. LIABILITY OF MASTER FOR THE ACT OF A SERVANT WHEN CONTROLLED BY ANOTHER.—If a contractor is employed, part of whose duties it is to make and guard an excavation, and before the work is commenced an arrangement is made between him and a subcontractor that the servants of the latter shall do the work under the control and supervision of the former, and they, in doing it, are guilty of negligence, their master is not answerable therefor, for as to such work, though employed by him, they are not his servants but the servants of the original contractor. *Cotter v. Lindgren*, 255.
3. DEFECTIVE APPLIANCES—RISKS ASSUMED BY SERVANT.—If injury is suffered by an employee through defects in the machinery or appli-

- ances furnished by his master and used in the business the servant cannot recover if he knew or had any means of knowledge equal to that of the master concerning such defects, and yet continued in the service, provided no inducement, such as a promise to cure the defect, leads him to so continue. *Victor Coal Co. v. Muir*, 299.
4. **RISKS ASSUMED BY SERVANT.**—A servant assumes all the usual and ordinary dangers incident to his employment, and is not entitled to recover damages resulting from such dangers, nor can he voluntarily and knowingly incur unusual and extraordinary dangers at the risk of his master. *Victor Coal Co. v. Muir*, 299.
  5. **MACHINERY AND APPLIANCES.**—It is the duty of the master to the servant to furnish sufficient, properly constructed, and safe machinery, or other materials or appliances, to be used by the servant in the course of his employment and necessary for the service. *Meador v. Lake Shore etc. Ry. Co.*, 384.
  6. **MACHINERY AND APPLIANCES.**—If the servant has equal knowledge with the master as to the machinery used, or means employed in the performance of the work he is required to do, and a full knowledge of existing defects, it does not necessarily follow that the master is liable for injuries sustained by reason of the use thereof. *Meador v. Lake Shore etc. Ry. Co.*, 384.
  7. **DANGEROUS MACHINERY—PROMISE TO REPAIR.**—If a servant is engaged in a dangerous service in which the machinery is defective, and has knowledge thereof, makes objection thereto, and is induced to remain in the master's employment, by promise or assurance of its repair, and, not having waived the objection, is injured by reason of such defect, without contributory negligence on his part, he is entitled to recover. But greater care is required of him than if he had not known of the defect. *Meador v. Lake Shore etc. Ry. Co.*, 384.
  8. **DEFECTIVE MACHINERY AND APPLIANCES—LIABILITY OF MASTER.**—If a servant is employed in the performance of ordinary labor, in which no machinery is used, or materials furnished, the use of which requires the exercise of great skill and care, the fact that a defective instrument or tool is furnished by the master, of which the servant has full knowledge and comprehension, does not render the master liable in case of injury to the servant caused by the use of such instrument. *Meador v. Lake Shore etc. Ry. Co.*, 384.
  9. **DEFECTIVE APPLIANCES—RISKS ASSUMED BY SERVANT.**—If a servant whose duties require him to use a ladder, upon discovering that it is defective and dangerous, notifies the master, who promises to furnish another, and directs the servant to use the old one until a new one is furnished, the servant assumes the risk in again using the old ladder, and cannot recover of the master for an injury sustained by its use, although the service in which it is used is of a kind that cannot be postponed. *Meador v. Lake Shore etc. Ry. Co.*, 384.
  10. **CONTRIBUTORY NEGLIGENCE OF SERVANT.**—An experienced coal miner who, with knowledge that the rock in the room in the mine in which he is at work is loose, dangerous, and liable to fall at any time unless propped, and that it should be propped, voluntarily continues to work in such exposed place without propping the rock, is guilty of such contributory negligence as to bar a recovery in case the rock falls upon and injures him. *Victor Coal Co. v. Muir*, 299.

11. CONTRIBUTORY NEGLIGENCE—VIOLATION OF STATUTE.—Although a statute requires certain things to be done by owners or agents of coal mines to secure the personal safety of persons employed therein, and provides that in case of a willful failure to comply with its provisions a right of action against the party at fault shall accrue to the party injured, yet such party cannot recover if he is guilty of willful contributory negligence as well as a violation of the provisions of such statute. *Victor Coal Co. v. Muir*, 299.
  12. CONTRIBUTORY NEGLIGENCE OF SERVANT.—Although injury occurs to a servant by reason of noncompliance on the part of the master with statutory requirements intended for the protection of the servant, the latter cannot recover if he is guilty of contributory negligence. *Victor Coal Co. v. Muir*, 299.
- See CONSPIRACY, 2; LABOR UNIONS, 3; RAILROADS, 10-16; WITNESSES, 5.

### MECHANICS' LIENS.

1. CHARACTER OF STRUCTURE SUBJECT TO.—A substantial and costly structure standing on its own stone foundation and built of brick to a height of twenty feet, though not entirely covered, inclosing a battery of boilers, and performing the function of a building as to such boilers, and constituting a part of the boiler plant which is separate and independent from an older boiler plant, except that its water and steam connections are made with the same pipes which make like connections with the old plant, but which are independent of and can be used without the old plant connections, is a building and can be subjected to a mechanic's lien, and is not such an addition, alteration, or repair as requires notice to be given of an intention to file such lien. *Wheeler v. Pierce*, 679.
2. CHARACTER OF STRUCTURE SUBJECT TO.—If a structure is of a substantial and permanent character, and may, in any reasonable sense, be known as a building, it may be encumbered by a mechanic's lien. *Wheeler v. Pierce*, 679.
3. A MECHANIC'S OR MATERIALMAN'S LIEN CANNOT BE ENFORCED AGAINST A SYSTEM OF WATERWORKS, nor any part thereof, constructed for the purpose of supplying a city and its inhabitants with water for protection against fire and for domestic, manufacturing, and other purposes, though such works do not belong to the city, but to a corporation organized under a statute of the state and authorized by an ordinance of the municipality. *Chapman Valve etc. Co. v. Oconto Water Co.*, 830.

### MERGER.

ESTATES, MERGER OF.—Where a cotenant of a life estate becomes the owner of the reversion equity will prevent or permit a merger as will best subserve the purposes of justice and the actual and just intent of the parties, and an intent to keep the two estates separate will be presumed where it will best promote the interest of the person in whom they have vested. *Jameron v. Hayward*, 268.

### MINES.

See WATERS, 8.

## MINORS.

See INFANTS.

## MOBS.

See CARRIERS, 2.

## MORTGAGES.

1. **STRUCTURES AFFIXED TO LAND** in such way as to be part of the realty are proper subject matter of a real estate mortgage. *Cross v. Wears Commission Co.*, 902.
  2. **AFTER-ACQUIRED PROPERTY.**—A mortgage covering after-acquired property is not inferior to a lien expressly reserved by the vendor on the property for its purchase price. *Wood v. Holly Mfg. Co.*, 56.
  3. **MORTGAGE EQUITABLE—LIEN FOR PURCHASE MONEY OF MACHINERY.**—A contract between the owners of a tract of land who have agreed to furnish a water company with a system of waterworks, and a manufacturer of pumps and machinery, giving the latter a lien upon the machinery until fully paid for is valid, and such lien is enforceable against such water company or other assignee of such contractors or of such company who purchased the land, although the pumps and machinery are permanently attached thereto, if it appears that their annexation was by the agreement conditional and dependent upon a successful test. *Wood v. Holly Mfg. Co.*, 56.
  4. **MORTGAGE EQUITABLE.—LIEN CREATED BY CONTRACT**, and not sufficient as a legal mortgage is generally regarded as in the nature of an equitable mortgage. The form of the contract is immaterial provided the intent to create a security appears. *Wood v. Holly Mfg. Co.*, 56.
  5. **EQUITABLE MORTGAGE OR LIEN** in the nature of a mortgage is enforceable in equity only. *Wood v. Holly Mfg. Co.*, 56.
  6. **PAYMENTS—DIRECTING APPLICATION OF.**—The proper and only time for the mortgagor to direct the application of the payment of a surplus of proceeds arising from the sale of the mortgaged property to the mortgagee is at the time that such property is delivered to him by the mortgagor. Failing to make such direction then, he cannot make it subsequently, though he did not know at the time of surrendering the property that after applying it to the debt on which it was surrendered a surplus would remain in the hands of the creditor. *Baum v. Trantham*, 697.
  7. **PAYMENTS—APPLICATION OF—MORTGAGE OVERPLUS.**—A provision in a mortgage that the net proceeds of any sale made thereunder shall be applied to the payment of the mortgage debt, and any overplus returned to the mortgagor, is not a direction by him to apply such overplus to the payment of any particular debt, and the mortgagee may apply it to any other claim held by him against the mortgagor. *Baum v. Trantham*, 697.
- See CHATTEL MORTGAGES; CORPORATIONS, 13; DEEDS, 10; ESTOPPEL, 1; NEGOTIABLE INSTRUMENTS, 5-9; PARTNERSHIP, 4.

## MUNICIPAL CORPORATIONS.

1. **MUNICIPAL CORPORATIONS HAVE SUCH POWERS ONLY** as are conferred by the statute creating them, and such incidental powers as are implied by and essential to the accomplishment of the purposes of their creation, and for their continued existence. *Champer v. Greencastle*, 390.

2. MUNICIPAL CORPORATIONS CAN EXERCISE ONLY THE POWERS given them by the legislature, and the latter can vest municipalities only with powers within the restrictions contained in the state and federal constitutions. *Mauldin v. City Council*, 723.
3. TWO KINDS OF DUTIES ARE imposed upon a municipal corporation—one for governmental purposes, discharged by the corporation as one of the political subdivisions of the state; the other arising from the grant of some special power, in the exercise of which the corporation acts as a legal individual. *O'Rourke v. Sioux Falls*, 760.
4. "APPROPRIATE DEPARTMENT"—STATUTORY CONSTRUCTION.—Under a statute providing that no money shall be drawn from the city treasury except . . . upon warrants signed by the head of the "appropriate department," the words "appropriate department" include all officials charged with duties pertaining to the city government for whose expenses the city is obliged to provide. The clerk of the city council is such official, although not technically the head of the department. *Bailey v. Philadelphia*, 691.
5. EQUITABLE CONTROL OVER. — Where municipal authorities are acting within their well-recognized power, or are exercising a discretionary authority, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the prejudice of a citizen. *Mt. Carmel v. Shaw*, 311.
6. MORAL OBLIGATION IS GOOD CONSIDERATION for the payment by a municipal corporation of public money for services rendered. *Bailey v. Philadelphia*, 691.
7. CONSTITUTIONAL LAW. — A MUNICIPAL CORPORATION IS NOT DENIED THE RIGHT OF LOCAL SELF-GOVERNMENT UNDER A STATUTE authorizing the appointment of certain of its officers to be made by the probate judge. *Fox v. McDonald*, 98.
8. OFFICERS OF, RESIDENCE OF WITHIN CITY, WHEN REQUIRED.—A statute authorizing a probate judge to appoint commissioners to exercise complete supervision over the police officers of a designated city, and to prefer charges against them for such acts as may justify their removal, implies that the appointees shall be residents of such city. *Fox v. McDonald*, 98.
9. POLICE OFFICERS OF A CITY are not its servants or agents. *O'Rourke v. Sioux Falls*, 760.
10. LIABILITY FOR ACTS OF AGENTS.—A city is not liable for the nonfeasance or misfeasance of its officers. *O'Rourke v. Sioux Falls*, 760.
11. STATUS OF OFFICERS AS AGENTS.—In the enactment of ordinances, and in the appointment of officers and agents for their enforcement, a city exercises a governmental authority, and within its limits acts as the representative of the state. Its officers, therefore, are regarded as agents, not of the city, but of the state. *O'Rourke v. Sioux Falls*, 760.
12. ORDINANCES—REASONABLENESS.—A municipal ordinance must be reasonable to be valid. *Champer v. Greencastle*, 390.
13. THE REASONABLENESS OF A MUNICIPAL ORDINANCE IS A PROPER SUBJECT FOR JUDICIAL INQUIRY, if enacted under a general grant of authority not prescribing the manner of its exercise. *Champer v. Greencastle*, 390.
14. ORDINANCES — REASONABLENESS — JUDICIAL INQUIRY.—An ordinance passed under a general grant of power to regulate places where intoxicating liquors are sold to be used on the premises, without prescribing the

particular manner in which such power is to be exercised, is open to judicial inquiry as to whether it is reasonable and valid, or unreasonable and void. *Champer v. Greencastle*, 390.

15. **ORDINANCES PROHIBITING SCREENS IN FRONT OF SALOONS.**—A municipal ordinance forbidding the erection or maintenance of door-screens, window-blinds, stained, ground, colored, or darkened glass to the doors, windows, or openings of any saloon or place where intoxicating liquors are sold to be used on the premises, or the erection or maintenance of any obstruction of any kind whatever of such doors, windows, or openings, that will obscure or prevent a full view of the interior of such saloon or place, and providing that such ordinance is not to be so construed as to prevent such saloonkeepers and other persons from having the usual and ordinary shutters to their doors, if passed under a general authority granted to license and regulate saloons without prescribing the mode of its exercise, is unreasonable and void. *Champer v. Greencastle*, 390.
16. **NUISANCES—POWER TO DECLARE.**—Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which, in fact, is clearly not one, but, in doubtful cases depending upon a variety of circumstances requiring judgment and discretion, their action is conclusive. *Harrison v. Lewistown*, 893.
17. **NUISANCE—POWER TO DECLARE—SLAUGHTERHOUSE.**—Under a general grant of power over nuisances, town authorities have power to adopt an ordinance declaring a slaughterhouse within town limits a nuisance. *Harrison v. Lewistown*, 893.
18. **FIRING CANNON IN STREET.**—A city is not liable for injuries caused by the firing of a cannon in a public street in violation of an ordinance, although the city officers knew that it was to be fired, and made no attempt to prevent it. *O'Rourke v. Sioux Falls*, 760.
19. **FIRING CANNON IN STREET—PLEADING NEGLIGENCE.**—In an action against a city to recover for personal injuries caused by the firing of a cannon in one of its public streets at night, and in violation of an ordinance, an averment in the complaint that the city had the power to light its streets and had undertaken to exercise it, and that the accident occurred because there was no light at the place of the accident, does not sufficiently charge negligence. The absence of a light at that particular time and place might be accounted for in many ways consistent with freedom from legal negligence. *O'Rourke v. Sioux Falls*, 760.
20. **FIRE LIMITS—PRESUMPTION.**—If the common council of a city has defined its fire limits by ordinance it is presumed to have done so with reference to the exact location of all buildings within such limits. *Kaufman v. Stein*, 368.
21. **FIRE LIMITS—REMOVAL OF HOUSES.**—Under an ordinance forbidding the removal of wooden buildings within established fire limits, a removal of such a building and its relocation twenty feet away from its former location on the same lot is such a removal as is prohibited by the ordinance. *Kaufman v. Stein*, 368.
22. **FIRE LIMITS.**—Municipal corporations have the power, under the general welfare clauses commonly contained in their charters, to establish fire limits and to forbid the erection or removal of wooden buildings within such limits. *Kaufman v. Stein*, 368.
23. **MUNICIPAL CORPORATIONS MAY BE VESTED WITH THE POWER OF TAXATION,** but such power can only be exercised according to charters, and

- within the limits of the constitution of the state. *Mauldin v. City Council*, 723.
24. **APPROPRIATIONS.**—A statute providing that "no money shall be drawn from the city treasury except by due process of law, or upon warrants signed by the head of the appropriate department," does not interfere with the discretion of the city council over the department to which appropriations shall be properly assigned for payment. *Bailey v. Philadelphia*, 691.
  25. **TRANSFERS OF APPROPRIATIONS.**—A city council has power by ordinance to transfer public money from one appropriation to another for the purpose of paying a moral obligation incurred by the city. *Bailey v. Philadelphia*, 691.
  26. **CONSTITUTIONAL LAW.—LEGISLATIVE DETERMINATION THAT AN OBLIGATION EXISTS AGAINST A MUNICIPALITY,** such, for instance, as a board of education of a township, is not conclusive, and, though the legislature has directed that taxes be levied to discharge such assumed obligation, the municipality may resort to the courts and there prove that no legal or equitable obligation existed against it, and for that reason refuse to levy the taxes so authorized. *Board of Education v. State*, 558.
  27. **WATERCOURSE.—JOINT LIABILITY OF MUNICIPALITY AND A PERSON CONSTRUCTING OBSTRUCTIONS THEREIN.**—If a municipality, acting as a private proprietor of lands, plans and authorizes the construction of a levee within the natural bed of a watercourse, and a contractor or other person constructs and maintains such levee, he, as well as the municipality, is answerable for the injuries resulting therefrom. An action may be maintained against either or both if the work was inherently and according to his plan and location a dangerous obstruction, such as ordinary prudence should have guarded against. *De Baker v. Southern California Ry. Co.*, 237.
  28. **PUBLIC WORKS, LIABILITY FOR INJURIES RESULTING FROM.**—A municipal corporation, entitled to exercise the police power for the protection of persons and property within its limits, and also to improve the channel and banks of a river therein in any manner deemed necessary for the protection of property and of such banks, is not liable for a mere error of judgment in devising a plan, and proceeding to its execution, if its officers exercise their judgment honestly, and not maliciously, oppressively, nor arbitrarily. *De Baker v. Southern California Ry. Co.*, 237.
  29. **PUBLIC WORKS, LIABILITY OF CONTRACTOR FOR CONSTRUCTING.**—Though a public work is of such a character that, because of the damage it inflicts upon private property, there is no right to proceed with it without first making compensation to the owner, a contractor executing it carefully and properly, according to the plan, is not liable for injuries resulting to the owners of neighboring property therefrom. The only liability is that of the municipality upon its obligation to compensate all damages resulting from the wrongful exercise of its power. *De Baker v. Southern California Ry. Co.*, 237.
  30. **MUNICIPAL CORPORATION IS LIABLE IN DAMAGES** for an injury to abutting property caused by its building a viaduct in a street, thus obstructing ingress and egress to the premises. *City of Pueblo v. Straut*, 273.
  31. **STREETS.—SHADE TREES IN THE PUBLIC STREETS OF A CITY ARE THE PROPERTY OF THE MUNICIPALITY,** and it has complete control over

- them, and may, therefore, destroy them, when necessary, in the progress of constructing a sidewalk. *Mt. Carmel v. Shaw*, 311.
32. A MUNICIPAL BOND ISSUED FOR MONEY NOT BORROWED NOR USED for a purpose for which the municipality was authorized to issue bonds is void. *Board of Education v. Blodgett*, 348.
33. CONSTITUTIONAL LAW—MUNICIPAL CORPORATIONS, PROPERTY RIGHTS OF.—The property rights of municipal corporations are protected by the same constitutional guaranties which shield the property rights of individuals from legislative aggression. *Board of Education v. Blodgett*, 348.
34. CHANGE IN STREET—DAMAGES.—If damages are occasioned an abutting owner by an improvement, made by a municipality in the street in front of his property, whereby ingress and egress to the premises are injuriously affected, this is a kind of injury not common to the general public for which the city is liable. *City of Pueblo v. Strick*, 273.
35. LIABILITY FOR VACATING STREETS.—While a city has power to vacate streets it is liable for damages to abutting property owners arising from the exercise of that power, including loss from depreciation in value, and it is no defense to an action for such damages that the owner still has access to his property by another street. *Heinrich v. St. Louis*, 490.
36. STREETS.—ON VACATING PART OF A STREET THE TITLE VESTS in the owners of the abutting lots, where the original right to the street was acquired by dedication. Therefore, an ordinance vacating part of a street, and declaring that the part vacated is donated and given to the abutting lots, states only a conclusion of law. *Mt. Carmel v. Shaw*, 311.
37. STREETS, VACATING PORTION OF.—A city having power to vacate streets has power to vacate any part of any street. *Mt. Carmel v. Shaw*, 311.
38. VACATION OF STREETS—REVERSION OF FEE.—Upon the vacation of a street the abutting owner is entitled to the exclusive ownership and use of the strip which was before a part of the street and subject to the public easement. *Heinrich v. St. Louis*, 490.
39. MEASURE OF DAMAGES FOR VACATING STREETS.—In an action by an abutting property owner to recover damages sustained because of a depreciation in the value of his property, caused by the vacation of a street, the measure of damages is the value of the property just before the street was vacated and its value thereafter. *Heinrich v. St. Louis*, 490.
40. STREET GRADE—DAMAGES—REMEDIES.—An ordinance, authorized by statute, and providing for the ascertainment and collection of damages sustained by an abutting property owner from the grading of a street does not exclude his constitutional remedy to obtain compensation for land taken for public use. Such remedy is merely cumulative. *Markowitz v. Kansas City*, 498.
41. STREET GRADE—DAMAGES—EVIDENCE.—In an action by an abutting lotowner for damages caused by grading the street in front of his premises the value of the property may be shown by evidence of what lots in the same locality sold for at the time; and evidence of the cost of material used in constructing a house erected on the lot is also competent for the same purpose. *Markowitz v. Kansas City*, 498.
42. STREETS—ADDITIONAL SERVITUDE.—AN ABUTTING PROPRIETOR is entitled to the use of the street in front of his premises to its full width as a means of ingress and egress, and for light and air, and this right is property, subject, however, to legislative control. Any infringement of this right, caused by the use of the street for other than legitimate



street purposes, is a "taking" within the meaning of the constitution. Hence, any structure on a street subversive of its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners for which compensation must be made. *Willamette Iron Works v. Oregon etc. Ry. Co.*, 620.

42. **STREETS—SUBTERFUGE AS TO CHANGE OF STREET GRADE—APPROPRIATION OF STREET TO PRIVATE USE.**—Neither the whole of a public street nor any portion of it can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. It is not a change of grade to construct in a public street a rising approach to a private toll-bridge, which approach is at one point thirteen and a half feet above the street surface. *Willamette Iron Works v. Oregon Ry. etc. Co.*, 620.
44. **STREETS—ADDITIONAL SERVITUDE—ILLUSTRATION.**—An approach to a toll-bridge owned by a private corporation, but not built as a part of or extension of any public highway, composed of a solid structure erected in the middle of a street sixty-six feet wide, which structure is thirty feet wide, extends along the street for some distance in front of an adjoining owner's property, rises to a height of thirteen and a half feet, and leaves a passageway only eight feet wide, is a servitude on the abutting property, for which compensation must be made, although authorized by the legislative and city authorities. *Willamette Iron Works v. Oregon Ry. etc. Co.*, 620.
45. **STREETS—ADDITIONAL SERVITUDE—QUESTION OF FACT.**—Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized. *Willamette Iron Works v. Oregon Ry. etc. Co.*, 620.
46. **STREETS, NEGLIGENCE IN NOT GUARDING AN EXCAVATION.**—One employed by another to make an excavation in the public street is not, after it is completed, under obligation to keep up barriers and lights to prevent injuries to the public. Such obligation, if it continues to exist, must be assumed by the person having the excavation made. *Cotter v. Lindgren*, 255.

See **LIMITATIONS OF ACTIONS, 3; MANDAMUS; MECHANIC'S LIEN, 3; NOTICES; WATERS, 16.**

### NEGLIGENCE

1. **FAILURE TO TAKE BEST COURSE TO AVOID INJURY IS NOT, WHEN.**—That one does not adopt the safest and best course to avoid injury, when suddenly exposed to great and imminent danger, does not make him chargeable with negligence. Under such circumstances he is not expected to act with that degree of prudence and wisdom that would otherwise be required of him. *Dickson v. Omaha etc. Ry. Co.*, 429.
2. **NEGLECTANCE IS NOT THE PROXIMATE CAUSE OF AN ACCIDENT UNLESS,** under the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence. It is not enough to prove that the accident is a natural consequence of the negligence. *Block v. Milwaukee etc. Ry. Co.*, 849.
3. **THE PROXIMATE CAUSE OF AN EVENT** is that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. Proximity in

- point of time or space, however, is no part of the definition. *Dickson v. Omaha etc. Ry. Co.*, 429.
4. DEGREE OF CARE AND DILIGENCE REQUIRED FROM CHILD of tender years is not as high as that required from an adult of presumed judgment and discretion. *Pierce v. Connors*, 279.
  5. CHILDREN ARE REQUIRED TO EXERCISE ONLY SUCH CARE AND PRUDENCE as may be reasonably expected of those who possess only the intelligence and maturity of judgment which they possess. *Brinkley Car Co. v. Cooper*, 216.
  6. DAMAGES FOR DEATH OF CHILD—EVIDENCE.—In an action to recover for the death of a minor child, evidence of the nature of the child's services from the time of its death until it became of age is admissible, though the recovery is not necessarily limited to the value of such services. *Pierce v. Connors*, 279.
  7. DEATH BY WRONGFUL ACT.—DAMAGES TO BE AWARDED for a death caused by negligence may be approximated by considering the age, health, condition in life, habits of industry, or otherwise, and ability to earn money on the part of the deceased, including his or her disposition to aid or assist the plaintiff. *Pierce v. Connors*, 279.
  8. DEATH BY WRONGFUL ACT.—MEASURE OF RELIEF in an action to recover for death caused by negligence is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased. The recovery allowable is in no sense a *solatium* for the grief caused by the death of a relative or friend, but it is only for the pecuniary loss to the living party entitled to sue. *Pierce v. Connors*, 279.
  9. CONTRIBUTORY NEGLIGENCE, WHEN WILLFUL.—If a person charged with an important duty voluntarily does, or omits to do, something in respect to such duty, indicating a reckless or wanton disregard of consequences to his personal safety, he is guilty of willful contributory negligence. *Victor Coal Co. v. Muir*, 299.
  10. NEGLIGENCE AS DEFENSE.—CONTRIBUTORY NEGLIGENCE of a party injured, when clearly established by evidence substantially uncontradicted, is to be adjudged a defense as matter of law by the court. *Victor Coal Co. v. Muir*, 299.
- See ANIMALS; BAILMENT, 2; BANKS, 8, 10, 14; CARRIERS, 4; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 19, 46; PARENT AND CHILD; RAILROADS, 19-21; REAL PROPERTY, 5, 6; TRIAL, 3.

### NEGOTIABLE INSTRUMENTS.

1. BILL OF EXCHANGE, WHAT IS NOT.—A promise by one person to another to accept a third person's order for a given amount, with the latter's name indorsed thereon, is not a bill of exchange. There is no liability if the order is never drawn; and, if the promise is to pay such third person's debt, the promisor is not liable to the promisee, as the promise does not express a consideration. *Allen v. Leavens*, 613.
2. RULES GOVERNING NEGOTIABILITY.—Under a statute making promissory notes negotiable, a promissory note, to be negotiable, must be in conformity with the statute as to matter of form, but such statute leaves all other instruments to be governed, as to their negotiability, by the law merchant. *The Famous Shoe etc. Co. v. Crosswhite*, 424.

3. **NEGOTIABLE INSTRUMENTS ASSIGNED BEFORE MATURITY**, unless payable to bearer, or indorsed, are subject in the hands of the assignee, until the debtor is notified of the assignment, to the same equities as would have affected the assignor. *Vann v. Marbury*, 70.
4. **BONA FIDE PURCHASER.—THE HOLDER OF NEGOTIABLE PAPER AS COLLATERAL SECURITY FOR A PRE-EXISTING DEBT** is not a bona fide holder for value, nor entitled to protection against equities and defenses existing between prior parties, of which he had no notice. *Vann v. Marbury*, 70.
6. **EFFECT OF PAYMENT OF MORTGAGE NOTE.**—The payment by the mortgagor to the mortgagee of the mortgage note, either before or after maturity, without notice of its transfer, protects the former, provided the note is non-negotiable, against suit thereon by the transferee, although the note was not produced and delivered at the time it was so paid. The burden of proof is on the transferee to show that the mortgagor had notice of the transfer before the payment was made. *Vann v. Marbury*, 70.
6. **ASSIGNMENT OF MORTGAGE NOTE AS COLLATERAL.—PURCHASE OF MORTGAGED PREMISES WITHOUT NOTICE.**—If land is mortgaged to secure the payment of a note, the character of which is not shown by the mortgage, and the mortgagor pays off the mortgage to and procures its cancellation by the mortgagee without notice of the transfer of the note, and without its surrender, and then sells the mortgaged premises to a purchaser in good faith under representations by the mortgagee that he is the owner of the mortgage note which has been temporarily mislaid, an assignee of such note from the mortgagee without indorsement, and as collateral security for an antecedent debt, cannot subject the land to the payment of such note. Under such circumstances the fact that the note was not produced and surrendered at the time of its payment does not put the mortgagor or purchaser on inquiry so as to lead to the notice of such assignment. *Vann v. Marbury*, 70.
7. **TRANSFER.**—No PRESUMPTION EXISTS that the payee of notes secured by mortgage has transferred them, before acquiring the equity of redemption from the mortgagor. One purchasing from such payee is not chargeable with notice that such notes, although not due, have been assigned unless the mortgage shows upon its face the negotiable character of such notes, in which event it may be incumbent on the purchaser to inquire as to whether they have been assigned. *Vann v. Marbury*, 70.
8. **NOTICE OF TRANSFER.**—A LETTER CONTAINING NOTICE of the transfer of a note, sent postage prepaid and to the proper office, properly addressed to the maker of the note and never returned, makes only a prima facie case of notice, which is overcome by the positive, unequivocal, and unimpeached denial of the maker that he ever received notice of such transfer. *Vann v. Marbury*, 70.
9. **FORBEARANCE AS CONSIDERATION FOR TRANSFER OF COLLATERAL.**—The transfer of a mortgage note as collateral security in consideration of indulgence granted on the mortgage debt does not make the transferee a bona fide purchaser or holder, unless there is such a clear, definite, and certain agreement as to the terms and time of such forbearance as to constitute an independent consideration for the transfer. *Vann v. Marbury*, 70.

## NEWSPAPERS.

See LIBEL, 11.

## NOTARIES PUBLIC.

See ACKNOWLEDGMENTS.

## NOTICE.

**OFFICIAL.**—THE MAYOR OF A CITY IS BOUND to take official notice of the appointment of police commissioners therein and of the necessary officers by them elected. *Fox v. McDonald*, 98.

See AGENCY, 1-7; CORPORATIONS, 4; NEGOTIABLE INSTRUMENTS; PARTNERSHIP, 18.

## NUISANCE.

1. **BURDEN OF PROOF.**—Upon a showing that property has been injured by a nuisance, the burden is upon the party maintaining the nuisance to show that the injury complained of proceeds from other and entirely separate causes. *Frost v. Berkeley Phosphate Co.*, 736.

2. **LIABILITY.**—One who, by maintaining a nuisance, inflicts an injury upon another is liable for the damages caused thereby, although the party injured has also sustained injury from other causes. *Frost v. Berkeley Phosphate Co.*, 736.

See INJUNCTION, 5, 6; MUNICIPAL CORPORATIONS, 16, 17; REAL PROPERTY, 3, 4.

## OBSTRUCTIONS.

See PRIVATE WAYS; WATERS, 6, 13, 14.

## OFFICERS.

1. **APPOINTMENT TO, WHAT IS.**—Though the action of an appointing board purports to be a ratification of a previous appointment such action is necessarily a reappointment. *Fox v. McDonald*, 98.

2. **THE GOVERNOR HAS NO POWER TO APPOINT OFFICERS** except when such power has been conferred by some constitutional or valid legislative provision. *Fox v. McDonald*, 98.

3. **CONSTITUTIONAL LAW.—THE POWER OF APPOINTING A PUBLIC OFFICER MAY BE DELEGATED** to the probate judge when the constitution has not otherwise provided for his appointment. *Fox v. McDonald*, 98.

4. **CONSTITUTIONAL LAW—PUBLIC OFFICERS, POWER OF APPOINTMENT, TO WHAT DEPARTMENT BELONGS.**—The power to appoint or elect to office does not necessarily belong to either the legislative, executive, or judicial departments. It is commonly exercised by the people, but the legislature may, as the lawmaking power, when not restricted by the constitution, provide for its exercise by either department of the government, or by any person or association of persons which it may choose to designate for that purpose. The function is legislative, executive, or judicial when the law has confided its exercise to the legislative, executive, or judicial department of government. *Fox v. McDonald*, 98.

5. **RIGHT TO OFFICE WHEN TERMINATED.**—An enactment giving authority to a designated person or officer to appoint certain public officers puts an end to the term of office of all incumbents deriving their as-

thority from another appointing power whose authority to make further appointments is annulled by such enactment. *Fox v. McDonald*, 98.

See EQUITY, 2.

#### ORDINANCES.

See EMINENT DOMAIN; MUNICIPAL CORPORATIONS, 7-11, 12-22.

#### PARENT AND CHILD.

1. **CHILD CANNOT RECOVER FOR LOSS OF TIME.**—A minor suffering physical injury from the negligence of another cannot recover compensation for loss of time during his inability to labor, nor for money voluntarily paid by his relatives for medicines or medical attendance, unless he has been emancipated and thereby become entitled to the proceeds of his own labor. *Peppercorn v. City of Black River Falls*, 818.
2. **JOINDER OR NONJOINDER OF PARENT** in an action to recover for the death of their minor child, caused by negligence or wrongful act, is material only to the parents. Either or both may sue. The grounds and measure of recovery are the same in either case, and the defendant cannot be prejudiced whichever course is pursued, nor can he be subjected to more than a single suit thereby. *Pierce v. Connors*, 279.
3. **PARTIES TO ACTION TO RECOVER FOR DEATH OF CHILD.**—The application of a parent entitled to join, but not joined, as a party to a suit to recover for the death of a minor child caused by negligence may be presented and granted at any time, even after judgment, or after review in the appellate court, for the purpose of protecting the interest which such parent may have in such judgment. *Pierce v. Connors*, 279.
4. **PARENT ENTITLED TO SUE FOR DEATH OF CHILD.**—The father and mother may join in an action to recover for the death of their minor child caused by negligence. Such joinder is permissive, not imperative. Either parent may sue alone. *Pierce v. Connors*, 279.

#### PARTIES.

See PARENT AND CHILD, 3.

#### PARTITION.

**LIFE ESTATE AND REVERSION.**—Where there is an estate for years in real property held in cotenancy by the parties to the action and a reversion held by one of them only, the partition must be limited to the estate for years, and, though partition cannot be made otherwise than by sale, it cannot include the reversionary estate. *Jameson v. Hayward*, 268.

#### PARTNERSHIP.

1. **PARTNERSHIP NAME ORDINARILY IMPLIES MORE THAN ONE PERSON**, yet the name under which one person does business is arbitrary, and, if he uses a name that implies a partnership, the reputed firm may be sued under such name, and execution on the judgment obtained runs against the partnership in name leviable only on its property, being in the nature of a proceeding *in rem*, and not *in personam*. *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.
2. **PARTNERSHIP NAME.**—The name "Birmingham Loan & Auction Company" fairly imports a partnership. *Birmingham Loan etc. Co. v. First Nat. Bank*, 45.

2. **PARTNERSHIP FUNDS AND PROPERTY, WHAT ARE.**—If under an agreement of partnership one of the parties is to advance certain necessary capital, but, instead of doing so directly, he gives a bond and mortgage to a third person to obtain credit for goods purchased for the firm business, such bond and mortgage become, in legal effect, part of the capital of the partnership. *Gotsian v. Shakman*, 820.
4. **A MORTGAGE OF PARTNERSHIP PROPERTY** from a partner holding the legal title without notice of its partnership character has a lien superior to partnership debts. *Robinson Bank v. Miller*, 883.
5. **PARTNERSHIP REALTY.**—No DOWER INTEREST CAN EXIST in partnership real estate until the firm debts are paid and its accounts adjusted. *Robinson Bank v. Miller*, 883.
6. **SURVIVING PARTNER AS TRUSTEE.**—The fiduciary relation of trustee and *cestui que trust* exists between the surviving partner and the representatives of a deceased partner. *Galbraith v. Tracy*, 867.
7. **PURCHASE BY ADMINISTRATOR.**—An administrator of a surviving partner who purchases certificates of purchase of partnership land sold under foreclosure at an inadequate price holds as trustee for the representatives of the deceased partners, though the firm funds in his hands are not sufficient to redeem all the land. *Galbraith v. Tracy*, 867.
8. **ADMINISTRATOR OF SURVIVING PARTNER AS TRUSTEE.**—The administrator of the last surviving partner is charged with the duty of completing the settlement of the firm estate as a trustee of the legal representatives of the partner first deceased. *Galbraith v. Tracy*, 867.
9. **MARSHALING SECURITIES.**—IF THERE ARE TWO CREDITORS OF A PARTNERSHIP, one of whom has the security of a bond and mortgage given by one only of the partners, but under such circumstances that his giving them may be regarded as part of his contribution to the firm capital which he had agreed to make, the creditor so secured may be compelled to exhaust such security before resorting to the other property of the firm. *Gotsian v. Shakman*, 820.
10. **PARTNERSHIP REAL ESTATE IS REGARDED IN EQUITY AS PERSONALTY**, no matter in whom the legal title is vested. The remainder of it, after partnership debts are all discharged, is held in common by the heirs, subject to dower, or goes to the devisees. *Galbraith v. Tracy*, 867.
11. **PARTNERSHIP REALTY.**—The mere use of land by a firm does not make it partnership property. *Robinson Bank v. Miller*, 883.
12. **PARTNERSHIP REALTY.**—If persons, who afterward become partners, buy land in their individual names and with their individual funds, before making the partnership agreement, the land is the individual property of the partners, though used in the firm business, in the absence of a clear and explicit agreement subsequently entered into, or controlling circumstances showing an intention to convert it into firm assets. *Robinson Bank v. Miller*, 883.
13. **PARTNERSHIP REALTY.**—IF THE INTENTION OF PARTNERS TO CONVERT LAND into firm property is to be inferred from circumstances, they must not admit of any other reasonable and satisfactory explanation, and if such conversion is sought to be shown by agreement of the partners, it must be clear and explicit. *Robinson Bank v. Miller*, 883.
14. **PARTNERSHIP REALTY.**—IN THE ABSENCE OF PROOF OF ITS PURCHASE WITH PARTNERSHIP FUNDS for firm purposes, realty standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common. *Robinson Bank v. Miller*, 883.

15. **PARTNERSHIP REALTY—RESULTING TRUST.**—If real estate is bought with partnership funds, the partner holding the legal title holds it subject to a resulting trust in favor of the partnership. In such case no agreement is necessary, and the statute of frauds does not apply. *Robinson Bank v. Miller*, 883.
16. **REAL ESTATE BOUGHT WITH PARTNERSHIP FUNDS** for firm purposes and applied to firm uses, or entered and carried in its accounts as a partnership asset, is deemed in equity to be firm property, no matter in whom the title is vested. *Robinson Bank v. Miller*, 883.
17. **REAL ESTATE IS NOT NECESSARILY THE INDIVIDUAL PROPERTY** of the members of a firm because the title is held by one or by the several members in undivided interests. Whether realty is firm or individual property depends largely upon the intention of the partners. *Robinson Bank v. Miller*, 883.
18. **NOTION OF PARTNERSHIP IN LAND** upon which a partnership business is carried on does not necessarily arise from notice of the partnership business. *Robinson Bank v. Miller*, 883.
19. **PARTNERSHIP REALTY—LIEN OF PARTNERS.**—Each member of a partnership has a superior lien on the partnership property for the payment of the firm debts to which it must first be applied. *Robinson Bank v. Miller*, 883.

See CHATTEL MORTGAGES; ESTOPPEL, 1.

## PARTY-WALLS.

See INJUNCTION, 3.

## PAYMENT.

- A **CERTIFIED CHECK**, given in the ordinary course of business and unattested by special circumstances, is not presumed to have been received as absolute payment. *Cincinnati Oyster etc. Co. v. National etc. Bank*, 560.
- See DEBTOR AND CREDITOR, 1; MORTGAGES, 6, 7.

## PEDDLERS.

1. **WHO IS.**—One who goes from place to place selling and delivering medicine is a peddler. *State v. Parsons*, 457.
2. **PEDDLING WITHOUT A LICENSE—PROSECUTION—BURDEN OF PROOF.**—In a prosecution for peddling without a license the defendant, if he claims to have a license, must produce it, as it is a matter peculiarly within his own knowledge. *State v. Parsons*, 457.
3. **CONSTRUCTION OF STATUTE.**—The sale of a sample sewing-machine by a traveling salesman whose business is mainly to solicit orders for an established agency for the sale of such machines is not a sale by a hawker or peddler within the meaning of a statute forbidding sales by hawkers and peddlers, but providing that its provisions shall not apply to sales by sample by persons traveling for established commercial houses. *State v. Moorehead*, 719.

See INTERSTATE COMMERCE, 4.

## PERJURY.

See EQUITY, 1.

## PERSONAL PROPERTY.

See FIXTURES; PARTNERSHIP, 10-12.

## PHYSICIANS AND SURGEONS.

See WITNESSES, 2, 9-11.

## PLEADING

1. A DEFECT IN A COMPLAINT MAY BE CURED BY THE ANSWER. *Ogden v. Ogden*, 151.
  2. JUDICIAL NOTICE MAY AID.—A complaint, otherwise indefinite and defective, may be aided by facts of which the court may take judicial notice, and thus sustained as against a general demurrer. *De Baker v. Southern California Ry. Co.*, 237.
  3. WHEN UNCERTAIN.—A complaint alleging that a pit in a street dug by the defendant was left without barriers or lights to warn persons of danger, on the ninth day of the month, and that an accident resulted therefrom on the tenth, but not stating whether at the latter date such pit was properly guarded or lighted or that it was in the night-time when the accident occurred, is uncertain in respect to a material matter, and a demurrer thereto on the ground of uncertainty should be sustained. *Cotter v. Lindgren*, 255.
  4. Pleas in abatement and in bar cannot be pleaded together. *Strouse v. Leipf*, 122.
  5. UPON DEMURRER the probative facts alone are admitted. Statements of conclusions of fact or of law are not admitted. *Longshore Printing Co. v. Howell*, 640.
  6. SUFFICIENCY OF DEMURRER.—A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action is sufficient in form, though it is attempted to take advantage of affirmative facts alleged in the complaint. *O'Rourke v. Sioux Falls*, 760.
  7. HARMLESS ERROR.—If a demurrer is sustained to a special plea, but the defendant interposes the general issue under which he is entitled to and does interpose the defense specially pleaded, the sustaining of such demurrer, whether erroneous or not, cannot be prejudicial. *Strouse v. Leipf*, 122.
  8. CONCLUSION OF LAW.—An allegation in a petition for a writ of mandamus that the relators have no remedy at law amounts to nothing more than a declaration of the pleader's opinion, and as an allegation of fact is without force. *State v. Carpenter*, 556.
- See APPEAL, 8; CORPORATIONS, 7; INJUNCTION, 1; INSURANCE, 1; INTERVENTION, 1; JOINT LIABILITY.

## POLICEMEN.

See MUNICIPAL CORPORATION, 2.

## POLICE POWER.

1. THE POLICE POWER OF THE STATE is its right to prescribe regulations for the good order, peace, health, protection, comfort, convenience, and morals of the community, which do not encroach on a like power vested in Congress by the federal constitution, or which do not violate any of the provisions of the organic law. This power resides in the state in its sovereign capacity, and can only be possessed and exercised by a



municipal corporation by a delegation thereof thereto by the lawmaking power of the state. *Ohamper v. Greenacastle*, 390.

2. **CONSTITUTIONAL LAW—STREET IMPROVEMENT.**—A state has no power, except its police power, to compel a private citizen to improve his property. The improvement of a public street does not fall within the police power. *Mauldin v. City Council*, 723.

See MUNICIPAL CORPORATIONS, 23; STATUTES, 13.

#### POLLUTION.

See WATERS, 8-12.

#### POSTPONEMENT.

See EXECUTION.

#### PREFERENCES.

See APPEAL, 5; ASSIGNMENT FOR THE BENEFIT OF CREDITORS; CORPORATIONS, 12; TRUSTS, 2.

#### PRESUMPTIONS.

See ACCOUNTS; APPEAL, 14; DEEDS, 6; EVIDENCE, 2-4; FRAUDULENT CONVEYANCES, 1; LIBEL, 6.

#### PRINCIPAL AND AGENT.

See AGENCY.

#### PRIVATE WAYS.

**EASEMENTS—WAYS—OBSTRUCTION.**—The owner of land, subject to a right of way, may, for the purpose of protecting his fields, erect across it a gate or other structure not unreasonably interfering with the right of passage. *Hartman v. Fick*, 658.

#### PROCESS.

1. **SUITORS—EXEMPTION FROM SERVICE OF PROCESS.**—A NONRESIDENT SUITOR coming into this state to attend the trial of his case is privileged from the service of civil process while coming to, attending upon, and returning from the court trying the cause. *Fisk v. Westover*, 780.
2. **SERVICE OF SUMMONS BY SPECIAL OFFICER.**—Under a statute making provision for the appointment of a person to serve process in a justice's court, if there is want of an officer, an indorsement on the summons reciting that, "the constable of said district being unable to act herein, and it appearing that the within process will not be served for want of an officer, I hereby appoint H. C. W. to make service," and signed by the justice, authorizes the appointee to serve the process. *North Pacific Cycle Co. v. Thomas*, 636.
3. **SERVICE OF SUMMONS—JURISDICTION—COLLATERAL ATTACK.**—The object of serving a summons is to advise the defendant that an action has been commenced against him, and to warn him that he must appear within a time and at a place named, and make such defense as he has, and, in default of his so doing, that judgment against him will be taken in the sum designated. If it accomplishes these purposes it confers jurisdiction, though there may have been some irregularity in its form or in the manner of its service. Hence, a judgment

based upon it is good against a collateral attack. *North Pacific Cych Co. v. Thomas*, 636.

See ACTIONS, 4; CORPORATIONS, 13.

#### PROFITS.

See RENTS AND PROFITS.

#### PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS, 2.

#### PROOFS OF LOSS.

See INSURANCE, 5-7.

#### PROXIMATE CAUSE.

See NEGLIGENCE, 2, 3.

#### PUBLIC POLICY.

See CONTRACTS, 7.

#### QUITCLAIM.

See DEEDS, 12.

#### RAILROADS.

1. DEDICATION OF LANDS FOR RAILWAY PURPOSES cannot be effected by a common-law dedication, but only in the manner prescribed by statute or by a conveyance executed by the owner. *Lake Erie etc. R. R. Co. v. Whitham*, 355.
2. COMMON LAW.—A DEDICATION OF LANDS CAN BE FOR PUBLIC PURPOSES only. Railway companies are private corporations, and therefore cannot acquire lands or an easement therein by common-law dedication. *Lake Erie etc. R. R. Co. v. Whitham*, 355.
3. HIGHWAYS—STREET RAILWAYS—ADDITIONAL SERVITUDE.—If township authorities give their consent to a railway company to occupy the country highways with a street railway they act as the representatives of those who build and use such railway, and not as the representatives of the owners of the private property along the highways thus occupied. The company can only protect itself in the use of such highways by contract with every property owner along roads occupied by it. *Pennsylvania R. R. v. Montgomery County etc. Ry.*, 659.
4. LEGISLATIVE POWER TO COMPEL MAINTENANCE OF CATTLE-GUARDS.—A statute requiring a railroad company to erect and maintain cattle-guards whenever demand is made upon it by the owner of land through which its road passes, with notice that such guards are necessary to prevent the depredation of stock upon his farm, is not unconstitutional in that it makes the landowner the sole judge of when such stock-guards shall be erected. *Birmingham etc. R. R. Co. v. Parsons*, 92.
5. CONSTITUTIONAL LAW—CATTLE-GUARDS—DAMAGES.—A statute providing that as to all stock passing over or through cattle-guards upon any line of railroad, and committing depredations and damages to the owners of land, the railroad company shall be liable for the full amount of such damages proven, together with costs, is unconstitutional, because it attempts to impose absolute liability, when the requirements of the

act as to the erection and maintenance of stock-guards may have been fully complied with by the company and no negligence exists. *Birmingham etc. R. R. Co. v. Parsons*, 92.

9. **DUTY AS TO STOCK-GUARDS.**—Under a statute requiring a railroad company to erect and maintain cattle-guards it is not guilty of negligence in leaving them open, because it is not the intention of the statute to require the company to keep the guards closed. *Birmingham etc. R. R. Co. v. Parsons*, 92.
7. **CARRIER, LIABILITY OF, WHEN COMMENCES.**—If a railway company furnishes an intending shipper, at his request, with a car, and leaves it upon a switch where it is loaded, and the agent of the carrier notified thereof, and he telegraphs to the trainmaster that the car is ready to be moved, the freight in such car must be deemed delivered to the carrier for the purpose of shipment, though no receipt has been given nor bill of lading issued therefor, if it is the custom of the carrier to move freight in advance of the issuing of such bill. In such circumstances the carrier is answerable for any subsequent loss of the goods not occasioned by the act of God or the public enemy. *Railway Co. v. Murphy*, 202.
8. **CARRIERS, BAGGAGE, LIABILITY OF FOR.**—If a passenger, ignorant of the rules of a railway company forbidding the receipt by its agents of money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, informing the agent of the amount, who accepts it to ship as baggage, the carrier's common-law liability therefor attaches. *Railway Co. v. Berry*, 212.
9. **CARRIERS—CARS FROM OTHER LINES—QUESTION FOR JURY.**—A railroad company owes the same duty of inspection of cars received from another road and run over its own lines as in respect to its own cars. Whether it has been guilty of negligence in this respect, causing delay, and whether such delay resulted in the loss complained of, is a question for the jury, if the evidence is conflicting. *Ruppel v. Allegheny Valley Ry.*, 666.
10. **A BAGGAGE-MASTER IS NOT ACTING BEYOND THE SCOPE** of his employment when he receives more money for transportation as baggage than by the rules of his employer he is authorized to receive. An agent whose business it is to receive and check baggage is authorized by the nature of his employment and the duties incident thereto to bind his employer. *Railway Co. v. Berry*, 212.
11. **MASTER AND SERVANT—DUTY OF MASTER TO FURNISH A SAFE PLACE IN WHICH TO WORK.**—A railroad company, especially in thickly settled portions of the country, is bound to keep its track safe and free from obstructions by proper fences, upon the principle that the master is bound to use ordinary care in keeping the premises upon which his servant is required to work in a condition reasonably safe and secure for the performance of the duties required of him. *Dickson v. Omaha etc. Ry. Co.*, 429.
12. **LIABILITY TO EMPLOYEE FOR INJURIES DIRECTLY CAUSED BY DEFECTIVE FENCE.**—An employee upon a railroad train, and, in the event of his death, his representatives, may recover for injuries received without his own fault by reason of the company's negligence in failing to comply with the law requiring it to fence its track. *Dickson v. Omaha etc. Ry. Co.*, 429.

13. **DEFECTIVE FENCE IS PROXIMATE CAUSE OF ACCIDENT, WHEN.**—If a railroad company fails to keep its track fenced as required by law, and a bull strays thereon through a defect in the fence, and collides with a passing engine, whereby its front wheels are derailed, and it is soon thrown over, killing the engineer, notwithstanding it has been reversed and the air-brake applied, the negligence of the company in failing to keep the fence in repair is the proximate cause of the accident, though the engine is running faster than allowed by the rules of the company, and is thrown from the track by reason of coming into a switch, in its derailed condition, nearly a thousand feet from where it struck the bull. *Dickson v. Omaha etc. Ry. Co.*, 424.
14. **ENGINEER NOT OBLIGED TO INSPECT FENCES.**—If a railroad company, required by law to keep its track fenced, neglects to do so, and a collision occurs with a bull entering upon the track through a defect in the fence, whereby the engineer is killed, it is not error, in an action against the company to recover for the engineer's death, to refuse to instruct the jury that the deceased was under the same obligation to inspect and ascertain existing defects as was required of the company. *Dickson v. Omaha etc. Ry. Co.*, 429.
15. **PORTER OF PULLMAN PALACE-CAR IS NOT A FELLOW-SERVANT BUT PASSENGER, WHEN.**—A Pullman palace-car being a part of a railway train, its porter, who, by his contract with the palace-car company and the contract between it and the railroad company, is subject to the rules and regulations of the latter is not a fellow-servant of those operating the engine and railway train while merely riding in the latter and attending to his duties. So far as the careful running and management of the train are concerned he is merely a passenger. *Jones v. St. Louis etc. Ry. Co.*, 514.
16. **NEGLIGENCE—DAMAGES—EXCESSIVE VERDICT.**—In an action by the porter of a Pullman palace-car against a railway company for personal injuries on account of the latter's negligence a judgment for three thousand dollars for the loss of one eye and the serious impairment of the other, with the attendant pain, loss of time, and expense incurred, is not excessive. *Jones v. St. Louis etc. Ry. Co.*, 514.
17. **HIGHWAYS—OCCUPATION BY STREET RAILWAY—ESTOPPEL.**—If a street railway has been constructed and operated at great expense over country highways without the legal consent of either the township officers or abutting owners, but without objection from them, they are estopped from demanding that the railway be torn up, or its operation enjoined. *Pennsylvania R. R. v. Montgomery County etc. Ry.*, 659.
18. **STREET RAILROADS—CONSENT OF AUTHORITIES NECESSARY TO CONSTRUCTION.**—A street railway company, not possessing the power of eminent domain, cannot build under its charter alone, but must have the consent of the proper municipal or local authorities, and, if the proposed line passes through a city, borough, or township intermediate the termini, and such city, borough, or township refuses permission, the power to build the road described in the charter cannot be exercised. *Pennsylvania R. R. v. Montgomery County etc. Ry.*, 659.
19. **STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS.**—If, in an action against a street railway company for injuries caused by defendant's negligence, an instruction has been given, at plaintiff's request, submitting the question of due care upon his part in getting on a car, he cannot complain because the court, at defendant's request, gives an

instruction submitting the same question. *Olfermann v. Union Depot R. R. Co.*, 483.

20. STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS.—In an action against a street railway company for injuries caused by a fall either in getting on a car or in getting off after it started, and where there is evidence justifying the court in submitting the question of plaintiff's negligence in getting off the car as one of fact, it is not error to fail to state what facts, if found to be true, would constitute negligence on the part of plaintiff. *Olfermann v. Union Depot R. R. Co.*, 483.
21. STREET RAILWAYS—NEGLIGENCE—INSTRUCTIONS.—It is proper, in an action against a street railway company for injuries caused by a fall either in getting on a car or in getting off after it started, to instruct the jury that negligence cannot be presumed but must be proved, and that, though the plaintiff was injured in getting on or off defendant's car, such fact alone would not entitle him to recover, but he must prove that he was injured as a direct consequence of the negligence of the defendant's employees. *Olfermann v. Union Depot R. R. Co.*, 483.
22. ELECTRIC RAILWAYS, DUTY OF TO GUARD TROLLEY WIRES.—It cannot be said, as a matter of law, that it is the duty of an electric railway to place guard wires over its trolley wires in such a way as to prevent telephone wires, in the event of their falling from any cause, from falling upon and coming in contact with the trolley wire, but it should be left to the jury, under all the facts of the case, to determine whether the method actually used was negligent. *Block v. Milwaukee etc. Ry. Co.*, 849.
23. AN ELECTRIC RAILWAY CORPORATION IS NOT ANSWERABLE for an injury resulting from a telephone wire falling and coming in contact with its trolley wire, unless a man of ordinary intelligence and prudence, engaged in operating the street railway in question, ought to have reasonably expected that the telephone wire would be likely to come in contact with its trolley wire at the place in question, and occasion injury to persons lawfully upon the highway crossed by such telephone wire. *Block v. Milwaukee etc. Ry. Co.*, 849.

See APPEAL, 12.

## RAPE.

- ASSAULT, ASSENT OF FEMALE UNDER AGE OF CONSENT.**—If a female is of such age that sexual intercourse with her is by law deemed rape, whether she consents or not, an assault on her with intent to have such intercourse constitutes the crime of assault with intent to commit rape, notwithstanding her actual consent to the act done or attempted. *People v. Verdegren*, 234.

## RATIFICATION.

See CONTRACTS, 9.

## REAL PROPERTY.

1. TITLE—EVIDENCE.—The occupant of land may rely on deeds and possession as showing color of title and the extent of his claim. *Heyward v. Farmers' Min. Co.*, 702.
2. TRIAL OF TITLE—PENDENCY OF ANOTHER ACTION.—If a complaint embraces two causes of action, one for the recovery of real property and the other for equitable relief, the former should be set on the law side

of the court, and the title there determined, without requiring plaintiff to bring another action, but, if he is so required, and does institute another action, error cannot be predicated upon the failure of the trial court to sustain defendant's plea of another action pending if such plea is not brought up for consideration by the court, and no exception is taken to the failure to consider and pass upon it. *Heyward v. Farmers' Min. Co.*, 702.

2. **NUISANCE—INSTRUCTIONS—LAWFUL USE.**—The question as to what constitutes unreasonable and unlawful use of premises, as well as to what constitutes an unlawful and unreasonable injury to other property arising from such use, is a question of law, and cannot be submitted to the jury. *Frost v. Berkeley Phosphate Co.*, 736.
4. **NUISANCE—INJURY ARISING FROM LAWFUL BUSINESS.**—If one uses his own land for the prosecution of some business from which injury to his neighbor must necessarily or probably ensue, he is liable if such injury does result, though he may have used reasonable care in the prosecution of such business. *Frost v. Berkeley Phosphate Co.*, 736.
5. **LANDOWNER, TRESPASSING CHILDREN, LIABILITY FOR INJURY TO.**—If a landowner allows hot water to escape and stand in a pool on his premises into which a child walks or falls and is injured, the jury, in an action to recover for such injury, should be instructed to consider whether the pool of water was attractive to children of the age of plaintiff, and whether this was or ought to have been known to the defendant, and whether, from all the circumstances, it appeared that the defendant, as a responsible prudent person, ought to have anticipated that children of the age of plaintiff would probably receive such injury as he did by reason of the situation and condition of the water. *Brinkley Car Co. v. Cooper*, 216.
6. **LANDOWNER—TRESPASSING CHILDREN.**—The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon, but he is liable for injuries to children trespassing upon his private grounds, when it is known to him that they are accustomed to go upon such grounds and that, from the peculiar nature and exposed condition of some thing thereon, it is attractive to children, and he ought reasonably to anticipate such an injury to a child as that which in fact occurred. *Brinkley Car Co. v. Cooper*, 216.

See FIXTURES; PARTNERSHIP, 10-19; TRESPASS.

#### RECEIVERS.

1. **FOREIGN RECEIVERS—RIGHTS OF RESIDENT CREDITORS.**—As between a foreign receiver, assignee, or trustee and a resident attaching creditor, the latter is protected by the courts of his state. *Holbrook v. Ford*, 917.
2. **POWER TO APPOINT.**—The courts of one state may appoint a receiver for a foreign corporation doing business therein and having property there, notwithstanding the appointment of a receiver at the domicile of the corporation. *Holbrook v. Ford*, 917.
3. **POWER TO APPOINT.**—A receiver for a foreign corporation cannot be appointed if the corporation has no property in the state of the appointing court, and has not appeared or been served with process, and none of its officers or agents are to be found in that state. *Holbrook v. Ford*, 917.

4. **RECEIVER FOR FOREIGN CORPORATION TAKES NO TITLE TO DEBTS** due it from debtors in another state, though in the ordinary course of business the debts would be payable to the corporation in the state of his appointment. *Holbrook v. Ford*, 917.
5. **RIGHT TO MAINTAIN SUIT.**—The rule that a foreign receiver is not allowed to maintain suit against assets of an insolvent debtor, as against a resident creditor, has no application to a receiver appointed by the courts of one state, under its laws, in a suit brought by a nonresident creditor. *Holbrook v. Ford*, 917.

See CONTEMPT, 1, 2; CORPORATIONS, 9.

### RECLAMATION.

See WATERS, 13.

### RELEASE.

- A **RELEASE OR ACQUITTANCE SIGNED WITHOUT KNOWLEDGE OF ITS CONTENTS** and without any intention to execute such an instrument is inoperative. *Lord v. American etc. Accident Assn.*, 815.

See EVIDENCE, 6.

### REMARKS OF COUNSEL.

See TRIAL, 3.

### RENTS AND PROFITS.

1. **LIABILITY OF OCCUPANT.**—One in possession of land under an honest, though mistaken, claim of title must account for all the rents and profits received by him while so in possession, and not for those only which accrue after the adverse claim is declared. *Rabb v. Patterson*, 743.
2. **LIABILITY OF BONA FIDE OCCUPANT.**—One who takes possession of land under a bona fide, though mistaken, claim of title is required to account only for the rents and profits actually received, and not for the rental value of the land. His executor is liable only for whatever amount could have been recovered from the testator. *Rabb v. Patterson*, 743.
3. **RENTS AND PROFITS COLLECTED FROM TRUST LANDS ARE TRUST FUNDS** in favor of the true owner while in the hands of one who has knowledge of the trust. A judgment to the contrary, reversed on appeal, does not release the funds from the trust. *Rabb v. Patterson*, 743.
4. **MEASURE OF RECOVERY.**—One in possession of land under an honest, though mistaken, claim of title and right is liable to the true owner only for the rents and profits actually received by him, less the amount expended in the payment of costs in an action to recover such rents and profits from a third party. *Rabb v. Patterson*, 743.
5. **RES ADJUDICATA.**—The failure of the true owner to assert a claim for rents and profits in an unsuccessful action brought against him by a party in possession to establish the title to the land does not estop the true owner from afterward maintaining an action to recover such rents and profits. *Rabb v. Patterson*, 743.
6. **TRUST FUNDS.**—THE RECOVERY OF A PERSONAL JUDGMENT by a *cestui que trust* against his trustee for the rents and profits of land held in trust does not preclude him from recovering from the grantee of such trustee, not made a party to the former suit, such rents and profits received by him from his grantor. The estate of such grantee, in case of

his death, is liable for the rents and profits so received. *Robt v. Patterson*, 743.

# **RES GESTÆ**

See AGENCY, 9.

# **RES JUDICATA,**

See JUDGMENTS, 4, 5; RENTS AND PROFITS, 8.

# **RESCISSION.**

See FRAUD, 3; INSURANCE, 9, 10.

# **REWARD.**

See BOUNTIES, 2.

# **REVERSIONS.**

See LIMITATIONS OF ACTIONS, 4; MERGER; PARTITION.

# **RIGHT OF WAY.**

See EASEMENTS.

# **RIOTS.**

See CARRIERS, 3.

# **RIPARIAN RIGHTS.**

See WATERS, 5-16.

# **SALES.**

1. **CONDITIONAL OR ABSOLUTE SALE—HOW ASCERTAINED.**—In deciding whether an agreement under which property has been delivered by one party to another constitutes a conditional or an absolute sale with a reservation of lien to secure the payment of the purchase price the entire transaction must be considered, and its legal effect ascertained, not alone by any particular provision of such agreement, but from all its stipulations and conditions, as well as from the notes given in connection therewith. *Andrews v. Colorado Sav. Bank*, 291.
2. **CONDITIONAL OR ABSOLUTE SALE—VALIDITY.**—The optional payment of the purchase price is as essential to constitute a transaction a conditional sale as the conditional passing of the title. A transaction in express terms imposing an unconditional liability upon the vendee to pay the purchase price, however characterized by the parties, is an absolute and not a conditional sale. If the agreement evidencing such transaction and attempting to reserve a lien on the property for the purchase price is not acknowledged and recorded as required by statute it is void as to third parties. *Andrews v. Colorado Sav. Bank*, 291.
3. **CONDITIONAL SALES—EVIDENCE.**—Although an agreement provides that the title to property delivered by one party to another shall remain in the vendor until full payment is made, thus evidencing an intent to make the sale conditional so far as the transfer of the title is concerned, such intent may be rebutted by the terms and stipulations in the notes given in pursuance of the agreement. *Andrews v. Colorado Sav. Bank*, 291.

See CONTRACTS, 5; DAMAGES, 2, 3; EXECUTION; LIENS.



**SCHOOLS.**

See AGENCY, 4-7.

**SEALS.**

See DEEDS, 2.

**SEPARATION OF JURY.**

See APPEAL, 17.

**SERVITUDES.**

See MUNICIPAL CORPORATIONS, 42-45; TOWNS, 1.

**SHIPPING.**

**BOAT LIENS.**—INTEREST may be allowed on the amount of a boat lien from the time the action is commenced to enforce it, and a lien awarded for the entire amount. *The Victorian*, 616.

**SLANDER.**

See LIBEL.

**SLAUGHTERHOUSES.**

See MUNICIPAL CORPORATION, 17.

**STATES.**

See OLIVER, 2; GRANTS, 2; INSURANCE, 19-22; JUDGMENTS, 11-15; LEGISLATURE; POLICE POWER; TRESPASS, 2.

**STATUTE OF FRAUDS.**

See ESTOPPEL, 5.

**STATUTE OF LIMITATIONS.**

See LIMITATION OF ACTIONS, 2.

**STATUTES.**

1. **CONSTITUTIONAL LAW, SUBJECT OF A STATUTE NOT EMBRACED IN ITS TITLE.**—A statute entitled, "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same and to make appropriations therefor," and which, after enacting general provisions upon the subject of the manufacture of clothing, appropriates a sum of money for the payment of the salaries of inspectors created by the act, contains a subject not expressed in the title, and must therefore be disregarded as void under a constitution declaring that, "No act hereafter passed shall embrace more than one subject, and that shall be embraced in the title, but, if any subject shall be embraced in the act which shall not be embraced in the title, such act shall be void only as to so much thereof as shall be so expressed." *Ritchie v. People*, 315.
2. **CONSTITUTIONAL LAW.**—IF A STATUTE INCLUDES TWO DISTINCT SUBJECTS, both expressed in the title, the whole act must be treated as void. *Ritchie v. People*, 315.
3. **CONSTITUTIONAL LAW—EXPRESSING OBJECT OF STATUTE IN ITS TITLE.**—In a statute entitled, "An act to establish a board of commissioners of

- police for the city of Birmingham," there must be inserted all powers necessary to the efficient administration of the police power of that city by commissioners, including the power to appoint police officers to take the place of those previously appointed and acting. *Fox v. McDonald*, 98.
4. **WHEN GO INTO EFFECT.**—Legislative enactments go into immediate operation, unless by force of some general law or provision contained in the act itself, its operation is postponed to some subsequent date. *Fox v. McDonald*, 98.
  5. **CONSTITUTIONAL LAW.**—IF A STATUTE CAN BE SO CONSTRUED AS NOT TO OFFEND against any constitutional limitation such construction will be indulged. *Fox v. McDonald*, 98.
  6. **CONSTITUTIONAL LAW.**—ALL PRESUMPTIONS ARE SOLVED IN FAVOR of the constitutionality of a statute. It devolves upon one who assails it to point out certainly and clearly wherein it is unconstitutional. *Mauldin v. City Council*, 723.
  7. **CONSTITUTIONAL LAW.**—STATUTES PARTLY VALID AND PARTLY VOID may be enforced as to the valid part, provided it is separate from the void. *Birmingham etc. R. R. Co. v. Parsons*, 92.
  8. **CONSTITUTIONAL LAW.**—THOUGH A PART OF A STATUTE IS UNCONSTITUTIONAL the remainder will not be declared to be unconstitutional also, if the two are distinct and separable, so that the latter may stand though the former becomes of no effect. *Ritchie v. People*, 315.
  9. **EXTRATERRITORIAL EFFECT OF.**—Although the laws of a state do not have any extraterritorial force as mere laws, yet things done in one state, in pursuance of the laws of that state, are to be regarded as valid and binding in other states. *American Water Works Co. v. Farmers' Loan etc. Co.*, 235.
  10. **CONSTITUTIONAL LAW—LIMITATION UPON RIGHT TO CONTRACT.**—A statute declaring that no person shall be employed more than a specified number of hours in each day or week is a restriction upon the right to contract for employment. *Ritchie v. People*, 315.
  11. **CONSTITUTIONAL LAW—RESTRICTION UPON RIGHT OF FEMALES TO CONTRACT FOR LABOR.**—A statute declaring that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, is an attempted infringement upon the constitutional rights of the employer and the employee, and must therefore be adjudged void under a constitutional provision to the effect that no person shall be deprived of life, liberty, or property without due process of law. *Ritchie v. People*, 315.
  12. **CONSTITUTIONAL LAW—SPECIAL PROHIBITIONS.**—A law purporting to deprive one class of manufacturers of the right to employ females for more than a specified number of hours per day, while it leaves manufacturers of other classes free from any prohibitions on this subject, there being no reason why the prohibitions should apply to one class rather than to another, is void because it is an arbitrary, unreasonable discrimination. *Ritchie v. People*, 315.
  13. **CONSTITUTIONAL LAW—POLICE POWER, LIMITATION UPON.**—Statutes passed in pursuance of the police power must have some relation to the end sought to be accomplished. Where the ostensible object is to secure the public comfort, welfare, and safety the statute must appear to be adapted to that end. It cannot invade the rights of persons and property under the guise of a mere police regulation when such is not the effect. *Ritchie v. People*, 315.

14. **CONSTITUTIONAL LAW—APPROPRIATION UNCERTAIN IN AMOUNT.**—A statute declaring that any person who shall kill or destroy any coyote shall be paid a bounty of five dollars out of the general fund of the state treasury for each coyote so destroyed does not constitute a specific appropriation, nor authorize the payment of any money until a further appropriation is made. *Ingram v. Colgan*, 221.
  15. **CONSTITUTIONAL LAW—BOUNTIES FOR KILLING COYOTES.**—A statute authorizing the payment of a sum of money for each coyote destroyed within the state is a valid exercise of its police power. *Ingram v. Colgan*, 221.
  16. **CONSTITUTIONAL LAW.**—THOUGH A CONSTITUTION PROVIDE THAT BILLS MAKING APPROPRIATIONS for the pay of members and officers of the general assembly and for salaries of officers of the government shall contain no provision on any other subject, a statute may be enacted regulating the manufacture of clothing, wearing apparel, and other articles, and making an appropriation to pay the expenses and salaries of the officers required to perform the special duties required by such statute. *Ritchie v. People*, 315.
- See ACTIONS, 1; CONSTITUTIONS, 3, 4; ESTOPPEL, 2; GAME LAWS; HUSBAND AND WIFE, 2, 3, 8; INSURANCE, 20-22; MASTER AND SERVANT, 11, 12; PEDDLERS, 3; RAILROADS, 5; TELEGRAPH COMPANIES, 4.

#### STREET RAILWAYS.

See HIGHWAYS; RAILROADS, 17-23; TOWNS, 2.

#### STREETS.

See MUNICIPAL CORPORATIONS, 34-46; POLICE POWER, 2; TAXES, 5, 6.

#### STRIKES.

See CONSPIRACY, 2.

#### SUMMONS.

See PROCESS.

#### SURETYSHIP.

See JUDGMENTS, 16.

#### TAXES.

1. **LIMITATION UPON POWER OF.**—The legislative power to impose taxes is subject to the limitation that it shall not be so employed as to take the property of one or of a number of persons and grant it as a benevolence to another. *Board of Education v. State*, 538.
  2. **THE AUTHORITY TO IMPOSE TAXES IS IN ITS NATURE LEGISLATIVE**, but is subject to the power of the courts to determine in particular cases whether the extreme boundary of legislative power has been reached and passed. *Board of Education v. State*, 538.
  3. **TAXATION TO PAY UNFOUNDED CLAIM.**—A FINDING BY A LEGISLATURE in a statute that a claim exists in favor of an individual and against a board of education of a township, accompanied by a direction that taxes be levied to meet it, is not conclusive upon the board, and it may therefore resist the levy of such taxes on the ground that the
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claim assumed by the legislature to exist was neither a legal nor a moral obligation against the city. *Board of Education v. State*, 588.

4. **CONSTITUTIONAL LAW.—TAXATION FOR EITHER STATE OR MUNICIPAL PURPOSES** must be equal and uniform upon all persons and property within the state, or within the municipality. *Mauldin v. City Council*, 723.
5. **CONSTITUTIONAL LAW.—TAXATION OF PROPERTY ABUTTING UPON PUBLIC STREETS** to pay for the cost of improvements to sidewalks and sewers in front of such land is valid and constitutional. *Mauldin v. City Council*, 723.
6. **CONSTITUTIONAL LAW.—TAXATION OF PROPERTY ABUTTING UPON PUBLIC STREETS** to pay the cost of improvements thereon, according to the supposed benefits to such property by such improvement, is opposed to the law of the land and unconstitutional. *Mauldin v. City Council*, 723.

See MUNICIPAL CORPORATIONS, 23, 26.

#### TELEGRAPH COMPANIES.

1. **COMMON CARRIER OF MESSAGES.**—Under the laws of South Dakota a telegraph company offering to carry telegraphic messages for the public is a common carrier of such messages. *Kirby v. Western Union Tel. Co.*, 765.
2. **CARRIERS—RESTRICTION UPON LIABILITY.**—A telegraph company cannot legally refuse to accept and transmit an offered message because the person offering it will not assent to stipulations restricting its liability as a common carrier; as where he refuses to sign an agreement that the company shall not be liable for damages in any case if the claim is not presented in writing within sixty days after the message is filed with the company for transmission. *Kirby v. Western Union Tel. Co.*, 765.
3. **REFUSAL TO SEND MESSAGE, WHEN COMPLETE.**—If a telegraph company refuses to send a message because the person offering it will not assent to stipulations restricting its liability as a common carrier of messages, the refusal is complete, although a few hours afterward such person sends a message substantially like the one refused, and assenting to such stipulations. The sending of the second message is neither a cure nor a waiver of the wrong. *Kirby v. Western Union Tel. Co.*, 765.
4. **REPEAL OF STATUTE—CONSTITUTIONAL LAW.**—A statute making a telegraph company a common carrier of messages is not superseded or repealed by a constitutional provision making it the duty of the legislature to provide reasonable regulations, by general law, for giving effect to the right of a corporation, organized for such purpose, to construct and maintain lines of telegraph within the state. *Kirby v. Western Union Tel. Co.*, 765.
5. **CIPHER TELEGRAM.**—In an action to recover from a telegraph company for a mistake in the transmission of a cipher telegram it is error to strike from the answer an allegation that such message was unintelligible to such company, intended so to be by the sender, and that the company was not informed of its importance, nor of the probable consequences of a failure on its part to transmit and deliver it promptly and correctly. *Hull v. Western Union Tel. Co.*, 734.
6. **ESTOPPEL AGAINST OBJECTING TO INJURIES BY.**—A landholder who, without objection, permits a telegraph line and poles to be erected upon a public highway, the fee of which belongs to him, is not thereby es-

topped from subsequently objecting to injuries done, or about to be done, by the corporation to trees growing in such highway by trimming or cutting them off to further facilitate the stringing of wires. *Daily v. State*, 578.

**7. TELEGRAPH CORPORATIONS, RIGHT OF TO ENTER PRIVATE PROPERTY.—**

Though a telegraph corporation is an instrument of interstate commerce and under the protection of the act of Congress declaring that the erection of telegraph lines shall as against state interference be free to all who accept its terms and conditions, yet such a corporation is not as against an individual citizen entitled to impair his property rights or to take or use his private property. *Daily v. State*, 578.

**8. HIGHWAYS—TREES, RIGHT OF TELEGRAPH CORPORATIONS OVER.—**If trees are growing in a highway of which an abutting landowner holds the fee, a telegraph corporation acting under a statutory grant of authority to construct its lines from a point to points along and upon such public road or highway has no right to injure such trees, whether the injury is necessary to the use of the lines of the corporation or not. *Daily v. State*, 578.

See CRIMINAL LAW, 5; HIGHWAYS, 1.

**THREATS.**

See HOMICIDE, 3, 4.

**TIDELANDS.**

See TRESPASS, 2.

**TORTS.**

See HUSBAND AND WIFE, 7-11.

**TOWNS.**

**1. HIGHWAYS—ADDITIONAL SERVITUDES.—THE CONSENT OF TOWNSHIP AUTHORITIES** justifies an entry upon a country highway so far as the public is concerned, but such authorities have no power to bind private property or subject it to a servitude for the benefit of any person or corporation other than the township and the public it represents. The carriage of passengers through the township from one city or borough to another by rail is in no sense a township purpose. *Pennsylvania R. R. v. Montgomery County etc. Ry.*, 659.

**2. HIGHWAYS—OCCUPATION BY STREET RAILWAY—CONSENT OF AUTHORITIES.—**Township authorities should act in their official capacity at a meeting upon any application made for leave to occupy township highways with a street railway, and their consent, as well as the terms upon which it was granted, must appear in the record of the meeting to be valid. *Pennsylvania R. R. v. Montgomery County etc. Ry.*, 659.

See RAILROADS, 3; TAXES, 2.

**TRADES UNIONS.**

See INJUNCTIONS, 2; LABOR UNIONS.

**TREES.**

See MUNICIPAL CORPORATIONS, 32; TELEGRAPH COMPANIES.

## TRESPASS.

1. **EASEMENTS.—AN ACTION OF TRESPASS FOR INJURY OR DISTURBANCE** in the enjoyment of an easement of a right of way over premises cannot be maintained. *Chloupek v. Perrotta*, 858.
2. **REAL PROPERTY—TRIAL OF TITLE. for trespass to land and to enjoin further trespass alleges that plaintiff is in possession and seised in fee, a denial of these allegations raises an issue as to title triable on the law side of the court. *Heyward v. Farmers' Min. Co.*, 702.**
3. **REAL PROPERTY—TRIAL OF TITLE.—MERE POSSESSION OF TIDE LANDS** without proof of title is not sufficient to enable the occupant to recover, as against the state and its licensee, in an action of trespass to try title in which plaintiff alleges that he is seised in fee and the defendants deny it. *Heyward v. Farmers' Min. Co.*, 702.

## TRESPASSERS.

See **REAL PROPERTY**, 5, 6.

## TRIAL.

1. **EVIDENCE—OBJECTION. when he entered the house of the accused, soon after the killing, the accused was perspiring freely, and seemed much excited, an objection to the whole of such statement is too broad to be allowed, as the evidence that the accused was perspiring freely is admissible. *Prince v. State*, 28.**
2. **RECEIVING EVIDENCE OUT OF COURT. of a trial, visited and examined the place of an accident for the purpose of ascertaining the condition of a walk, through defects in which the plaintiff claims to have received injuries, a new trial must be granted. They have no right to base their finding on evidence not adduced in court nor upon a view not authorized by the court. *Peppercorn v. City of Black River Falls*, 818.**
3. **REMARKS OF COUNSEL. by defendant's negligence, if the claim for damages seems exorbitant, though the injuries are serious, the jury, in giving weight to plaintiff's testimony, have a right to consider the fact as to whether he is prosecuting an exorbitant claim; and it is not an abuse of discretion for the trial court to permit defendant's attorney to remark, in argument, that there is "evidence of an attempt to make a large sum of money out of a comparatively trivial injury." *Olfemann v. Union Depot R. R. Co.*, 483.**
4. **ARGUMENT OF COUNSEL—LIMITATION OF, WHEN REASONABLE. a criminal case, the witnesses are few, and are examined only as to the character of the accused and the party assaulted, and the principles of law are plain and familiar, a limitation of the argument of counsel for defendant to twenty-five minutes is reasonable. *Yeldell v. State*, 20.**
5. **ARGUMENT BY ATTORNEY—POWER OF COURT TO LIMIT. "that in all criminal prosecutions the accused has the right to be heard by himself or counsel, or either, the court has power to limit the argument by counsel as to time by reasonable rules and regulations. *Yeldell v. State*, 20.**

6. **CRIMINAL LAW—PROBABLE INNOCENCE.**—An instruction that, if there is a probability of defendant's innocence, the jury must acquit is proper, and should be given if requested. *Prince v. State*, 28.
7. **CRIMINAL LAW—PROBABLE DOUBT.**—An instruction that, if there is a probable doubt of the guilt of the accused, the jury must acquit is properly refused. *Prince v. State*, 28.
8. **INSTRUCTIONS WHICH SINGLE OUT AND UNDULY EMPHASIZE** any one or more facts are bad. *Prince v. State*, 28.
9. **INSTRUCTION WHICH MUST BE REDUCED TO WRITING.**—If, during the argument of a cause, counsel makes a statement of law which the court deems incorrect, it may admonish him to desist, and if in doing so the court makes what it deems to be a correct statement of the law and for the purpose of correcting that made by counsel, and no request is made that such statement be reduced to writing, the action of the court is not in violation of a statute requiring all instructions to the jury to be in writing. *Rogers v. State*, 154.
10. **THE AFFIDAVIT OF A JUROR MAY BE RECEIVED TO IMPEACH HIS VERDICT** by proving that during the trial he visited the place of the alleged accident for the purpose of ascertaining the condition of a walk from which it was claimed the injury to the plaintiff resulted. *Peppercorn v. City of Black River Falls*, 818.

See APPEAL.

#### TRUSTS.

1. **TRUSTEES ARE NOT ALLOWED TO PLACE THEMSELVES IN A POSITION** in which it is difficult for them to be honest to their trust. *Galbraith v. Tracy*, 867.
  2. **The relation of trustee and cestui que trust** must arise out of facts as they exist at the time of the original transaction. It cannot be created by subsequent and independent circumstances. *Sell v. West*, 508.
  3. **TRUST FUNDS—PREFERENCE AMONG CREDITORS.**—A trust creditor cannot obtain a lien or preference over other creditors of an insolvent estate until he makes it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property or the proceeds thereof. The trust fund or its proceeds must be traceable. Hence, the *cestui que trust*, after dissipation of the trust fund, has no longer any remedy in equity to fix a charge upon the estate of such trustee, but must come in and share with the general creditors. *Ferchen v. Arndt*, 603.
  4. **A RESULTING TRUST CANNOT ARISE** if the transactions on which the supposed trust is bottomed appear to have had their origin in any fraudulent purpose. *Sell v. West*, 508.
  5. **RESULTING TRUST—LIMITATION OF ACTION.**—If a father vests title to land in his son by transactions intended by the former to defraud his creditors, no resulting trust arises in favor of the other heirs, upon the father's death, though the claims of such creditors are barred by the statute of limitations. *Sell v. West*, 508.
- See **HOMESTEAD; HUSBAND AND WIFE**, 5; **PARTNERSHIP**, 6, 8, 14, 15; **RENTS AND PROFITS**, 4, 6.

#### UNDUE INFLUENCE.

See **WILLS**, 1, 2, 6-9.

## USURY.

THE TAKING IN ADVANCE, FOR the period of one year, the highest rate of interest allowed by law upon a negotiable instrument does not constitute usury. *Bank v. Cook*, 171.

## VACATING.

See MUNICIPAL CORPORATIONS, 24-29.

## VENDOR AND PURCHASER.

See MORTGAGES, 2.

## VERDICT.

See TRIAL, 10.

## VESTED RIGHTS.

See BOUNTIES, 2.

## WAIVER.

See ACTIONS, 4; APPEAL, 20; CONTEMPT, 3; INSURANCE, 5, 14-18; TELEGRAPH COMPANIES, 2.

## WATER COMPANIES.

See INTERVENTION, 2; MORTGAGES, 2.

## WATERS.

1. TO BE NAVIGABLE a stream must have sufficient depth and width to float useful commerce, the test being navigable capacity, without regard to present use or whether the surroundings are such as to make it presently useful for commerce. *Heyward v. Farmers' Min. Co.*, 702.
2. NAVIGABILITY.—THE FACT THAT A STREAM HAS NOT BEEN IN ACTUAL USE for the purposes of commerce does not affect its navigable character. *Heyward v. Farmers' Min. Co.*, 702.
3. NAVIGABLE STREAM WHICH RUNS UP INTO A PRIVATE ESTATE and is there lost in a surrounding marsh, though it has never been used as a highway for commerce, and is not connected with other such highways, if capable of such use, is not thereby deprived of its navigable character. *Heyward v. Farmers' Min. Co.*, 702.
4. WATER RIGHTS.—WATER IS THE COMMON AND EQUAL PROPERTY of every one through whose domain it flows, and the right of each to its use and consumption, while passing over his possessions, is the same. He must not so use it as to destroy or unreasonably impair the equal rights of others. *Tennessee Coal etc. Co. v. Hamilton*, 48.
5. WATER RIGHTS.—EVERY RIPARIAN PROPRIETOR has an equal right to have the stream flow through his lands in its natural state, without material diminution in quantity, or alteration in quality, subject to the limitation that each is entitled to the reasonable use of the water for domestic, agricultural, and manufacturing purposes. *Tennessee Coal etc. Co. v. Hamilton*, 48.
6. OBSTRUCTION AND CORRUPTION OF.—Any diversion or obstruction of water which substantially diminishes the volume of a natural stream so that it does not flow *ut currere solebat*, or which defiles or corrupts it to such a degree as to essentially impair its purity and prevent the



use of it for any of the reasonable and proper purposes to which running water is usually applied, is an infringement of the right of other owners of land through which the watercourse runs, and creates a nuisance for which those thereby injured are entitled to a remedy. *Tennessee Coal etc. Co. v. Hamilton*, 48.

7. **RIPARIAN RIGHTS—CONFLICT BETWEEN.**—The natural right of one proprietor to have a natural stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors, whose fertilization, cultivation, or occupation of their lands, and whose use of the stream for mill and manufacturing purposes, for irrigation and domestic purposes, tends to make the water more or less impure, or to diminish its quantity, especially when the population becomes dense. Such proprietors can be held responsible only for appreciable injury caused by their works and not for slight inconveniences or occasional annoyances. *Tennessee Coal etc. Co. v. Hamilton*, 48.
8. **RIPARIAN RIGHTS TO MINE—POLLUTION.**—An upper riparian proprietor has the right to use the water of a natural stream for mining purposes, although he thereby impairs its purity to a limited extent; but he has no right to so pollute the stream as to render it unfit for domestic purposes to the lower owner, or to so fill up the channel as to cause injurious debris to be deposited on his land. *Tennessee Coal etc. Co. v. Hamilton*, 48.
9. **RIPARIAN RIGHTS—CONTRIBUTORY NEGLIGENCE.**—In an action by a lower owner against an upper owner, to recover for the pollution of a natural stream and for depositing injurious debris on his land, a plea that such lower owner is guilty of contributory negligence in failing to take due precaution to prevent such injury is insufficient and unavailing to avoid a recovery. *Tennessee Coal etc. Co. v. Hamilton*, 48.
10. **POLLUTION—DAMAGES.**—After the pollution of a natural stream by an upper proprietor and an injury from deposits of debris has ceased the lower owner can recover only for such pollution while it existed and for the injury from the debris until such time as it is washed away or otherwise disposed of. *Tennessee Coal etc. Co. v. Hamilton*, 48.
11. **POLLUTION—MEASURE OF DAMAGES.**—In an action to recover for the pollution of a natural stream and an injurious deposit of debris the question whether such unsanctioned interference enhances or diminishes the value or the comfort of the occupation of the land is an inquiry which may enter into the computation of damages, but it is not the sole criterion of damage nor any test of the right to maintain an action for the tort committed. *Tennessee Coal etc. Co. v. Hamilton*, 84.
12. **LIABILITY FOR DEPOSITING DEBRIS—DEFENSE THAT OTHERS CONTRIBUTED TO THE INJURY.**—In an action by a lower owner against an upper owner, to recover for the pollution of a natural stream and for injury arising from a deposit of debris on his land, the upper owner may prove that another upper owner contributed to the injury independent of his own acts, and thus limit the amount of recovery against himself to the actual injury inflicted by him. *Tennessee Coal etc. Co. v. Hamilton*, 48.
13. **RECLAMATION—RIGHT OF A LANDOWNER TO CONSTRUCT WORKS OF.**—A landowner has the right to protect his lands from overflow by erecting a levee along and outside of the natural banks of a stream without incurring any liability for the effect of the consequent increase of the flow of waters upon lands of neighboring proprietors. Perhaps he may,

also, in case of a stream with a wide sandy bed, have the right to reclaim a reasonable portion of it by means of a levee constructed within its banks, but has no right for such a purpose to so obstruct the channel or divert the current as to force the water into a new and permanent channel through lands of other proprietors outside of the natural banks. *De Baker v. Southern California Ry. Co.*, 237.

14. **DAMAGES FOR OBSTRUCTING BY LEVEES.**—If a levee is built in or across a natural stream, whereby its waters are diverted from their usual course, and caused to flow out of their natural channel against and upon the lands of a private person, he is entitled to recover for injuries resulting to his property. *De Baker v. Southern California Ry. Co.*, 237.
15. **DAMAGE—EXTRAORDINARY FLOODS.**—An instruction that if a levee was improperly and negligently built by the defendant, and diverted the river and the channel thereof, so as to make them run through the plaintiff's lands, it is no defense that the damage was done in time of extraordinary flood, if the danger of such a flood was known to the defendant, or could have been ascertained by inquiry, correctly states the law of the subject referred to therein. *De Baker v. Southern California Ry. Co.*, 237.
16. **OFFICIAL BANKS OF.**—A municipal corporation cannot, by designating the lines of the official bed of a watercourse, authorize the construction of a levee thereon if such lines are in fact within the natural bed of the stream, and the levee constructed thereon would obstruct the flow of the waters, and cast them upon and against the lands of neighboring proprietors to their substantial injury. *De Baker v. Southern California Ry. Co.*, 237.

See EMINENT DOMAIN; GRANTS, 2; MUNICIPAL CORPORATIONS, 27.

## WILLS.

1. **TESTAMENTARY CAPACITY—FRAUD AND UNDUE INFLUENCE.**—If testamentary incapacity exists there is no room for the operation of fraud or undue influence in the execution of a will, and evidence respecting it is immaterial. *Burney v. Torrey*, 33.
2. **REQUISITES.**—Sufficient capacity, free agency, without the imposition of fraud or deceit, are the elements of a valid will. *Burney v. Torrey*, 33.
3. **TESTAMENTARY CAPACITY DEFINED.**—One who at the time of executing a will has mind and memory sufficient to recall and remember the property he is about to bequeath, the object of his bounty, and the disposition which he wishes to make, to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relations of its elements to each other, has a sound and disposing mind and memory. *Burney v. Torrey*, 33.
4. **TESTAMENTARY CAPACITY—UNDUE INFLUENCE—UNEQUAL GIFTS.** Although the evidence may tend to show some impairment of the mind, if testamentary capacity remains, the fact that there has been an unequal distribution of property by will does not authorize the conclusion that such disposition was the result of fraud or undue influence. To justify this conclusion there must be other evidence tending to show that the will of the testator was unduly coerced, or that there was fraud and deceit practiced in its procurement. *Burney v. Torrey*, 33.

6. **UNEQUAL BEQUESTS—EVIDENCE TO ACCOUNT FOR.**—If, in a contest over a will by which the testator's widow is made the sole beneficiary to the exclusion of his son, it appears that the latter has deserted his first wife and two children, a clipping from a newspaper to the effect that he has married another woman is admissible in evidence as tending to account for the fact that the testator made no provision for him in his will. *Burney v. Torrey*, 33.
6. **UNDUE INFLUENCE.—AN UNEQUAL DISTRIBUTION** of his property by a testator, or his omission entirely from his bequests of some of his next of kin, is not, in the absence of mental incapacity or undue influence, evidence to show either testamentary incapacity or undue influence. *Burney v. Torrey*, 33.
7. **UNDUE INFLUENCE—WHAT IS NOT.**—One who, by forethought and affectionate attention, and provision for the wants of another, and by integrity, acquires his confidence and a controlling influence over him using no deceit, is not guilty of exercising undue influence. *Burney v. Torrey*, 33.
8. **UNDUE INFLUENCE.**—A bequest or devise procured by fraud and deceit, such as, without the imposition, would not have been made, even though there is neither force nor fear brought to bear, is procured by undue influence, and cannot be sustained. *Burney v. Torrey*, 33.
9. **A WILL IS EXECUTED UNDER UNDUE INFLUENCE** if the testator has testamentary capacity, but his power to exercise it has been overcome by force or fear, or the desire for peace, or some improper influence not proceeding from affection. *Burney v. Torrey*, 33.
10. **WEIGHT OF EVIDENCE OF ATTESTING WITNESS.**—The testimony of a witness who has attested a will should be weighed and considered the same as that of any other witness. The fact that he is an attesting witness, of itself, does not entitle his evidence upon the question of testamentary capacity to greater weight than it would otherwise be entitled to, except that by reason of his being an attesting witness the law authorizes him to give his opinion of the mental capacity of the testator. *Burney v. Torrey*, 33.

See DEVISE; WITNESSES, 7, 13, 16.

#### WITNESSES.

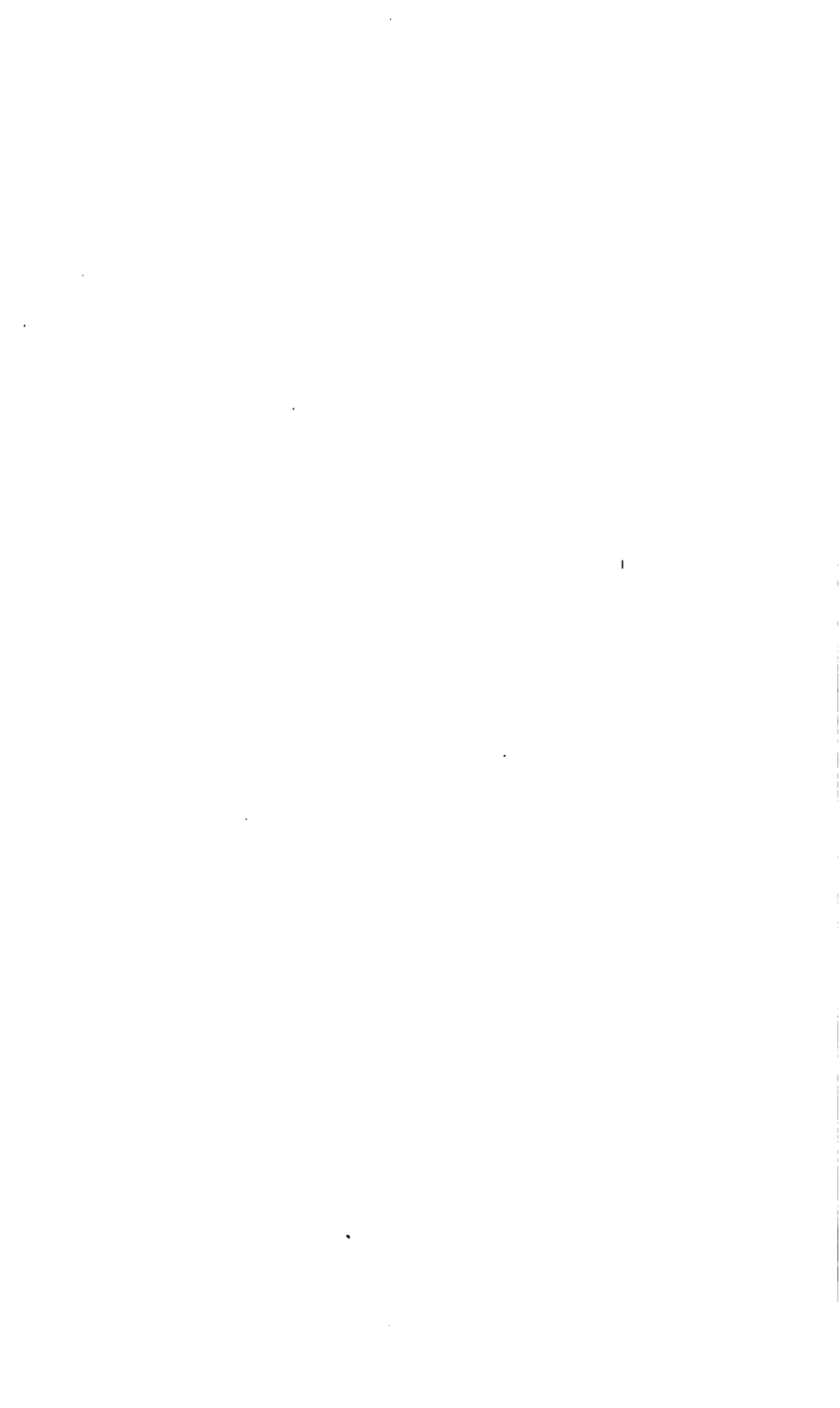
1. **A JUDGE WHILE PRESIDING AT THE TRIAL OF A CRIMINAL CASE** may not, against the objection of the defendant, testify as a witness. *Rogers v. State*, 154.
2. **CROSS-EXAMINATION** extends only to the subjects covered by the direct examination. Hence, after a physician has testified, not as an expert, but simply as to facts obvious to others, it is not error to disallow his cross-examination as an expert. *Enos v. St. Paul etc. Ins. Co.*, 796.
3. **INFERENCES.**—After a witness has stated facts, he cannot testify as to his inferences. They are for the jury. Hence, it is not error to refuse to allow a witness to state how the talk and appearance of an insured person, upon any occasion, affected others than himself. *Enos v. St. Paul etc. Ins. Co.*, 796.
4. **CRIMINAL LAW—EVIDENCE—GENERAL QUESTIONS.**—A question propounded to a witness in a criminal case, by which he is asked "Do you know a fact pointing to the guilt of some one else?" is too general to be allowed, as it constitutes the witness a judge of the effect of a fact. *Prince v. State*, 28.

6. CRIMINAL LAW—EVIDENCE—INTEREST IN PROSECUTION.—If an employee is testifying in a criminal case it may be shown by him that his employer is interested in the prosecution. *Prince v. State*, 28.
6. CREDIBILITY OF FOR JURY.—Courts should refrain from language calculated to convey to the jury its own impressions as to the credibility of the witness. *Prince v. State*, 28.
7. EXPERT, FEES OF.—A professional or expert witness may be compelled to attend court and to testify on a criminal trial respecting any fact within his knowledge, though it is one acquired by study and experience, and he cannot recover any fees in excess of those recoverable by other witnesses. *Flinn v. Prairie County*, 168.
8. WITNESS, COMPELLING SERVICE OF WITHOUT REWARD.—A professional or expert witness cannot be compelled to make any examination or preliminary preparation, nor to attend the trial for the purpose of listening to testimony that he may be better enabled to give his opinion as an expert. For services of this character he may demand extra compensation. *Flinn v. Prairie County*, 168.
9. EVIDENCE.—A PHYSICIAN called upon to attend an injured person may, at his request, be examined as a witness, and permitted to describe his condition, nor is the testimony of the witness as to such condition incompetent, though it was partly acquired from statements made to him as a medical man for the purpose of receiving advice and treatment, if there is no ground for claiming that the doctor's relation to the party injured was other than as a medical adviser, and not for the mere purpose of being a witness. *Block v. Milwaukee etc. Ry. Co.*, 849.
10. EXPERT EVIDENCE.—A witness who testifies that he has been a practicing physician for many years, and during that time has been called upon to see a few cases of gunshot wounds, but could not by any means by looking at the wound on the deceased tell whether it was made by a rifle ball or a pistol ball, is competent to testify to the character of the wound, but is not competent to give an opinion as evidence that it was caused by a rifle ball. *Prince v. State*, 28.
11. EVIDENCE—EXPERT WITNESS.—A PHYSICIAN is competent to testify that the condition of a person whom he was called upon to attend could have been produced by contact with a wire heavily charged with electricity, and also as to whether in his opinion there was a reasonable probability of an ultimate recovery from such injury. *Block v. Milwaukee etc. Ry. Co.*, 849.
12. INSURANCE—PROVING VALUE OF PROPERTY.—One having sufficient knowledge of the value of property destroyed by fire to speak with intelligence on the subject is competent to give his opinion as to its value. *Enos v. St. Paul Ins. Co.*, 796.
13. WILLS—TESTAMENTARY CAPACITY—OPINION EVIDENCE.—If a witness has had such a long and intimate acquaintance with a testator as to enable him to form a correct judgment as to the testator's mental condition, he may give his opinion that the testator is of sound mind, provided he also states the facts upon which such opinion is based. *Burney v. Torrey*, 33.
14. INVADING THE PROVINCE OF THE JURY—EXPERTS ON INSANITY.—An instruction on a will contest that common experience has shown and courts have often remarked, that opinions of professional witnesses upon questions of insanity have become of little practical value, from the almost universal conflict between those called upon the

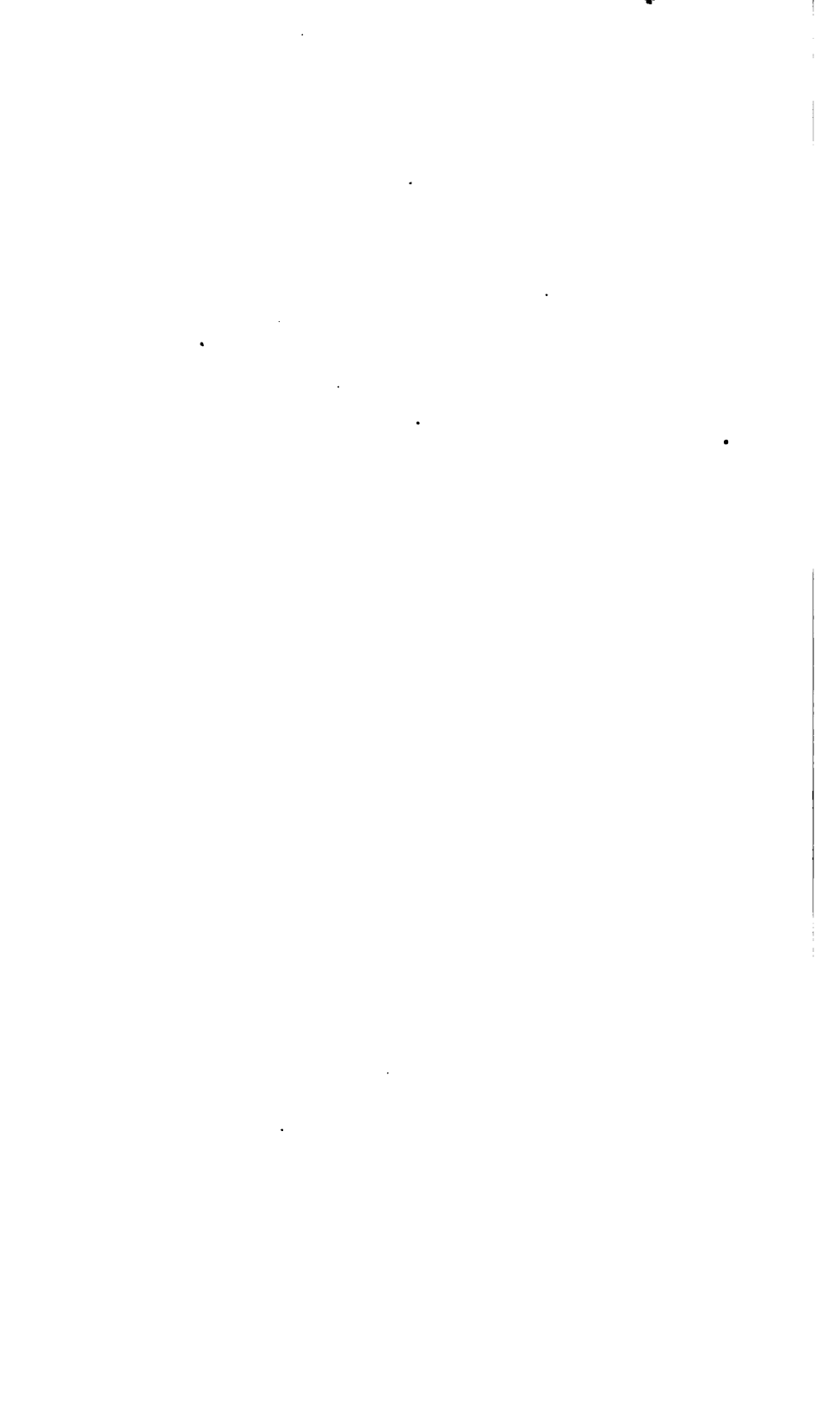
different sides, as compared with the testimony as to the acts and sayings of the person whose mind is under investigation, is erroneous, as invading the province of the jury, and should not be given. *Burney v. Torrey*, 33.

15. OPINIONS INVADING THE PROVINCE OF THE JURY.—An instruction on a will contest that the opinions of persons not experts on the question of insanity, though ever so honestly formed, are most unsafe guards for the ascertainment of the truth, and that to render such opinions legal evidence they must be accompanied by the facts or circumstances upon which they are based, is erroneous as invading the province of the jury, and should not be given. *Burney v. Torrey*, 33.
16. WILLS—TESTAMENTARY CAPACITY—EVIDENCE.—Witnesses well acquainted with a testator are competent to testify that he was "childish"; that his expression "was simple," or that he was a "shrewd business man," as tending to show his testamentary capacity. *Burney v. Torrey*, 33.
17. WILLS—TESTAMENTARY CAPACITY—OPINION OF NONEXPERT.—A witness, not an expert, cannot be asked, for the purpose of showing a testator's unsoundness of mind, whether he seemed to have his mental faculties about him all of the time, unless it is first shown that the witness had an opportunity to know, accompanied with a statement of facts upon which the opinion is based. *Burney v. Torrey*, 33.
18. NONEXPERT OPINION—HANDWRITING.—The rule which prohibits a nonexpert from giving an opinion based upon a comparison of handwriting has no application when the party whose name is signed is himself being examined as to whether the signature is his or not. *First Nat. Bank v. Allen*, 80.
19. TO IMPEACH A WITNESS BY PROOF OF CONTRADICTIONARY STATEMENTS they must be material to the issue. *Burney v. Torrey*, 33.

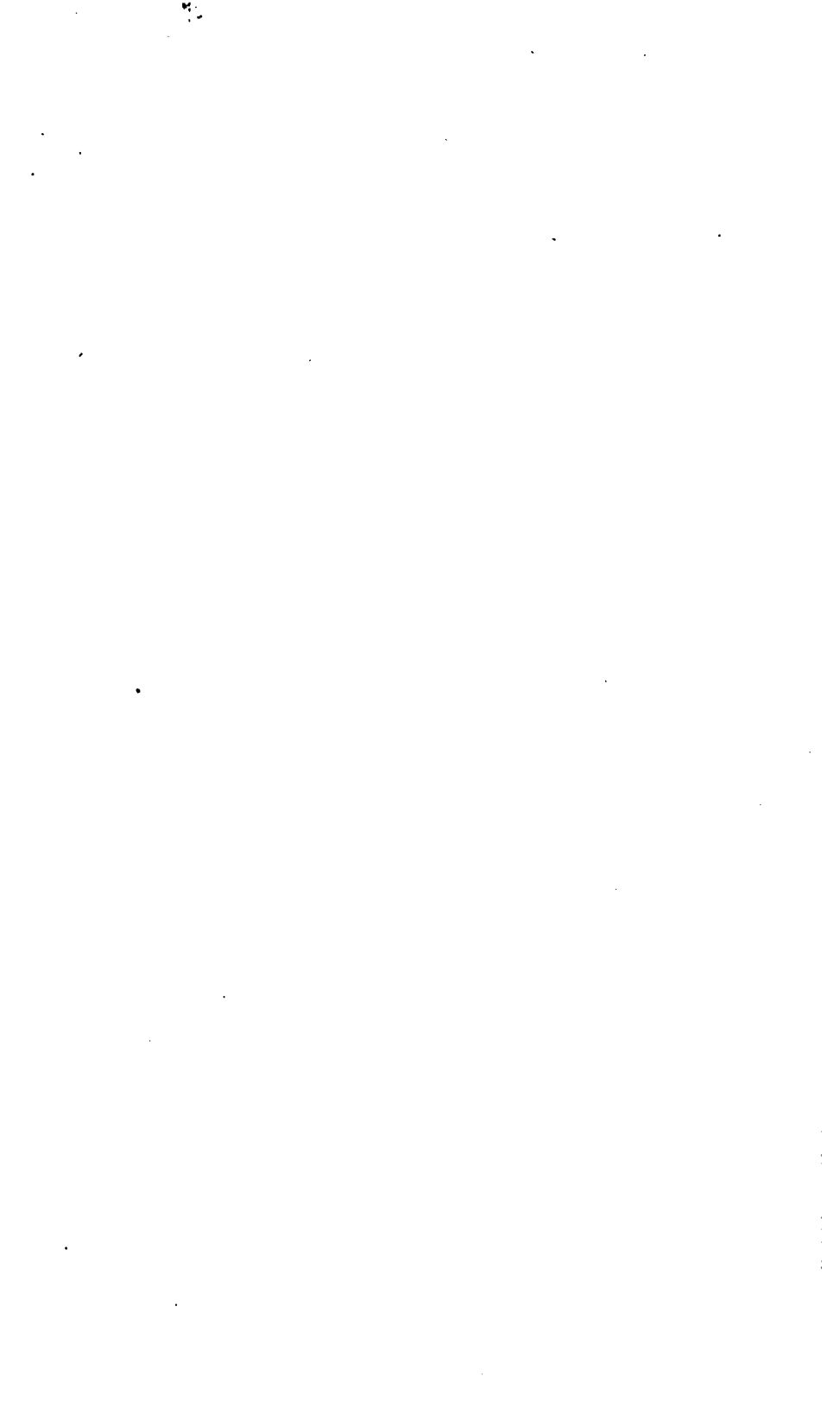
See APPEAL, 19; WILLS, 10.

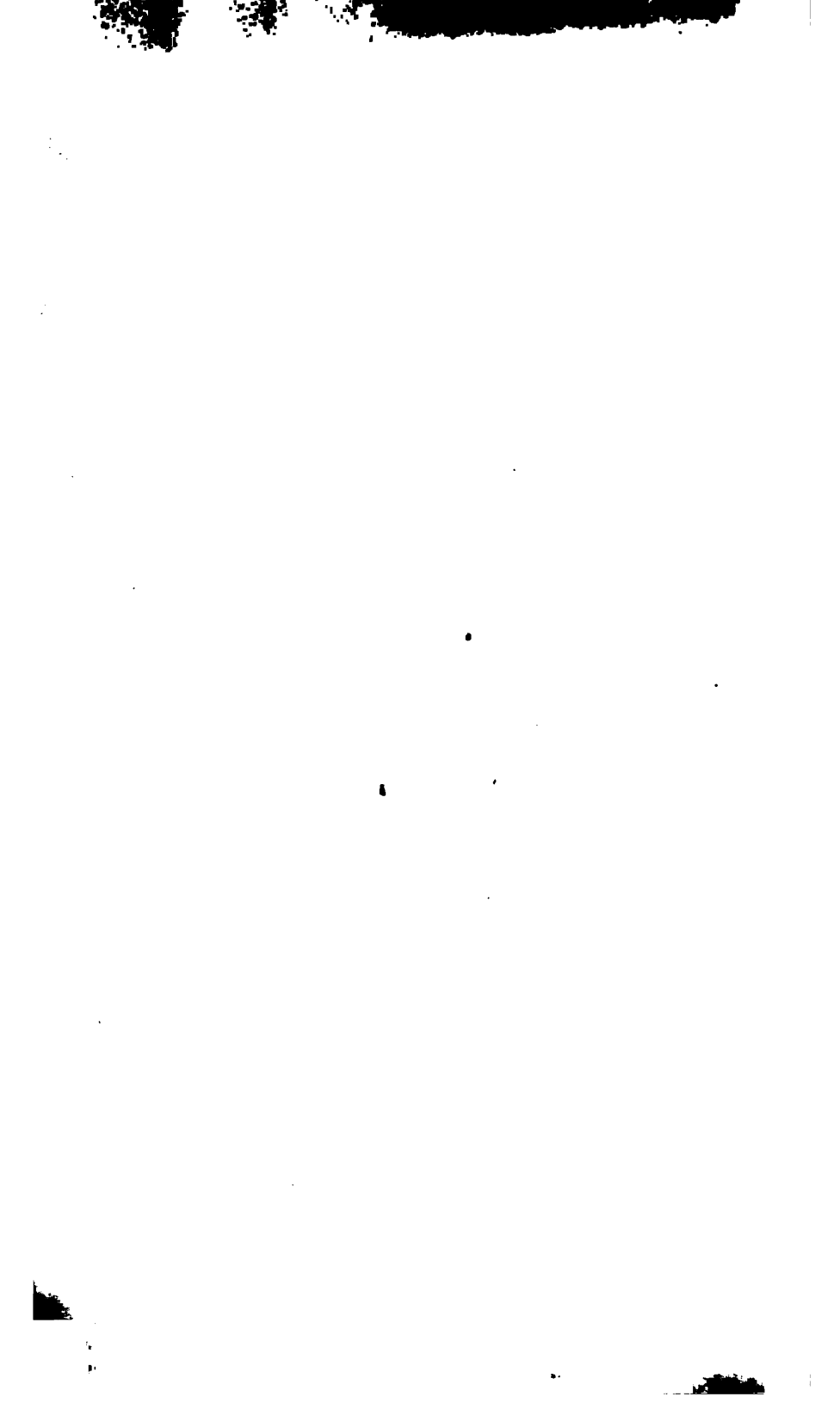






















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